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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1993

E.R. MYERS, Warden, et al., *Petitioners*

v.

GREGORIO JIMINEZ, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
LINDA C. JOHNSON, Supervising
Deputy Attorney General
*SHARON WOODEN RICHARD
Deputy Attorney General
300 South Spring Street, Suite 500
Los Angeles, California 90013
Telephone: (213) 897-2284

Attorneys for Petitioner
**Counsel of Record*

153 pp

QUESTIONS PRESENTED

The California Supreme Court has approved numerical division inquiries, but condemned the supplemental Allen charge, to deadlocked juries. The United States Court of Appeals for the Ninth Circuit in this case ruled the state trial court coerced the deadlocked jury because it inquired into the jury's numerical division but failed to give the cautionary portion of the Allen charge.

The questions presented are:

1. Whether, under the principles of federalism, the Court of Appeals had the authority to impose its own rule upon California's criminal procedure for dealing with deadlocked juries.

2. Whether the Court of Appeal's ruling in this case applied a "new rule" for the first time on collateral review.

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NO. 93-_____

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FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The State of California hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The published opinion, Gregorio Jimenez v. E.R. Myers, Warden, No. 91-56476, is attached as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 8, 1993. That Court denied a timely petition for rehearing and suggestion for rehearing en banc on January 20, 1994. App. B.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall . . . be deprived

of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 of the United States Code, section 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall

> entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Gregorio Jimenez shot Leticia Trovao twice after she rejected his proposal of marriage. Leticia suffered a collapsed lung as a result of the shooting.

Jimenez's trial for attempted murder was by jury. The case was submitted to the jury on November 3, 1988, at 9:15 a.m. CT 118. After hearing readback testimony for one hour and deliberating for only two hours and forty-five minutes, the jury sent a note to the court which said, "We

are unable to reach a verdict, and feel strongly that we would not be able to reach a verdict." CT 123, App. D.

At 4:34 p.m., the jury, at the request of the court, returned to the courtroom where the following colloquy between the judge and foreperson occurred:

THE COURT: "For the record, we're now in the presence of all the jurors. . . Mrs. Clingan . . .[¶] . . . You're the foreperson, correct?

THE FOREMAN: "Yes.

THE COURT: "You have given us a note indicating unable to reach a verdict. [¶] What I would like to do is make a couple of general inquiries only of you in a general way, no specifics. [¶] It's been just a little over an hour from the time that the readback was had until you sent your note to me. You've been out roughly one day

now deliberating. [¶] What I would like to know, how many votes have been taken?

THE FOREMAN: "Five or six.

THE COURT: "Without telling me which direction, just numerically, how did it start, and what was it on the last?

THE FOREMAN: ". . . To the best of my recollection, it started out about maybe seven to five, eight to four. Went to nine to three. All right. To back up, this morning, nine, two, and one.

THE COURT: "It's gone to one now?

THE FOREMAN: "Eight to four, nine to three?

THE COURT: "If you can recall, just generally the voting.

THE FOREMAN: "This afternoon though, nine to three.

THE COURT: "All right. So you did

have - How about in between, nine-two and one and then the nine-three, has there been movement one way or the other?

THE FOREMAN: "Nine-one-two, I would say at this point. And yes, there has been some movement in one direction.

THE COURT: "Okay. Well, that's what's important to me because of the nature of the type of case. I want to find out that there has been movement. [¶] It will be my intent at this point in time, based upon what I've heard so far, what's happened so far, is to allow you to leave at this time for the weekend. I know that Mr. Davis has his problem with his airline tickets, but I'm going to ask that you come back on Monday morning at 9:00 o'clock for deliberation at least for the morning to see if we have any

further [illegible] [be] my intention at this time. . ." II RT 439-441.

On November 7, 1988, at 9:00 a.m., after a long weekend, the jury resumed deliberations. After 17 minutes the jury foreman sent a note to the court asking for "a written copy of the law as it pertains to this case, as well as jury instructions as it pertains to this case." CT 131. Closing arguments of both counsel were also requested by the jury. CT 132. The court sent the jury instructions back into the jury room but ultimately denied the request for rereading of counsel's closing arguments. Deliberations continued until noon. CT 132.

Following an hour and a half lunch break, the jury reconvened and resumed deliberations. CT 132. At 2:03 p.m., the court received a note from the jury requesting further directions because of

impasse. CT 133. At 2:35 p.m., the jury reentered the courtroom where the following colloquy between the judge and foreperson occurred:

THE COURT: ". . . I've received your note. `We are at an impasse and request further direction.' Is that still the posture of the jury?

THE FOREMAN: "Yes.

THE COURT: "Okay. Now, last Friday I inquired of you as to whether or not there had been any movement by the jury. [¶] So I'll ask that same question again with the understanding, all I want is numbers, not which direction that you're at. How many votes have you taken since last Friday?

THE FOREMAN: "Two or three. Two.

THE COURT: "Two more?

THE FOREMAN: "Uh-huh.

THE COURT: "What's the latest?

THE FOREMAN: "Eleven-one.

THE COURT: "So there has been, then, substantial movement since the last time.

THE FOREMAN: "Yes.

THE COURT: "All right. Due to the fact we have had that type of movement, I would request, then, to finish the rest of today and see where we are at that point in time. All right? Okay. We'll see you back. Have you taken your afternoon break yet?

THE FOREMAN: "No, we haven't.

II RT 448-449.

Out of the presence of the jury, defense counsel moved for a mistrial. The trial court determined the jury's progress since the previous day of deliberation and the emotional tenor of the case warranted

two more hours of additional deliberation. If the jury was deadlocked at 4:30 p.m., the court was prepared to declare a mistrial. II RT 450-451. Between 4:25 and 4:30 p.m., the jury returned a guilty verdict to the charge of attempted murder. CT 125.

Jimenez was subsequently sentenced to ten years in state prison. CT 141-142. The California Court of Appeal, Fourth Appellate District, Division Two, affirmed the conviction. The state appellate court found that there was "nothing coercive in the manner in which the trial court determined the probability that the jury could reach a verdict. The court acted merely as a neutral observer, not as a cheerleader for some final determination." App. D. A petition for review was denied by the California Supreme Court.

Jimenez then filed a petition for writ of habeas corpus in the United States District Court. The final recommendation of the Magistrate Judge was to grant the writ. The Magistrate Judge concluded that the jury polling, coupled with the trial court's comments to the jury that "substantial movement" was important, was sufficiently coercive to violate Jimenez' due process right to a fair trial. The District Court rejected that conclusion and denied the writ. The District Court found that the effect of the trial court's questions and remarks was to learn in a neutral way from the jury if further deliberations would be of use to them. The comment that "substantial movement" was important was merely the judge's confirmation that fruitful deliberation was still going on. The District Court concluded there was no showing that the

combination of jury polling and judge's comments coerced the jury or deprived Jimenez of a constitutional right. App. C.

On December 8, 1993, the United States Court of Appeals for the Ninth Circuit, in a published opinion, reversed the District Court's order denying habeas corpus relief. The three-judge panel voted two to one, with a very strong dissent by Circuit Judge Kozinski. The panel held that the state trial judge impermissibly coerced the jury to render a guilty verdict when, without admonishing the jurors not to surrender their individual views in order to achieve a verdict, the judge inquired into the numerical division of the jury and told the jury to seek unanimity when there was only a single hold-out. The panel gave its ruling retroactive effect, by

determining it had not announced a new rule. App. A.

In dissent, Circuit Judge Kozinski noted that the state trial judge followed a practice the California Supreme Court has approved repeatedly. Circuit Judge Kozinski stated:

> By overturning the conviction so obtained, my colleagues are casting serious doubt on a procedure the California Supreme Court and a number of other state supreme courts have approved for dealing with apparent jury deadlock. My colleagues hold that the practice of asking for a jury's division is so inherently coercive it renders a trial fundamentally unfair when combined with even the trivial comments the trial judge made here. This ruling bodes ill for countless convictions in

California and other states that follow the California practice.

My colleagues give no persuasive reason for such heavy-handed interference with the power of state supreme courts to resolve difficult issues of trial practice. Today's ruling moves us one step farther away from a truly federal system where the state courts serve as laboratories for shaping the flexible and evolving standards of due process. It moves us one step closer to a world where our way of doing things becomes the only way, where state courts dare not deviate from our procedures lest they risk wholesale invalidation of their convictions. App. A.

On January 20, 1994, the Ninth Circuit denied California's petition for rehearing and suggestion for rehearing en

banc. App. B. The Court, on its own motion, stayed issuance of the mandate pending further order from the Court.

REASONS FOR GRANTING THE WRIT

The California Supreme Court and the United States Court of Appeals for the Ninth Circuit have developed conflicting rules regarding supplemental charges to a deadlocked jury. Only this Court can determine whether the Ninth Circuit has impermissibly interfered with matters that should be left to the states under the doctrine of federalism.

California is but one of eight states, including Hawaii and Washington in the Ninth Circuit, which approve the practice of numerical division inquiries. The other states are Missouri, Oklahoma, Mississippi, Texas, and Louisiana. New Mexico does not encourage the practice, but has specifically found the inquiry

noncoercive. An additional eleven states, namely, North Carolina, Illinois, Arizona, Oregon, Arkansas, Georgia, Minnesota, Alabama, Colorado, Iowa, and Nevada have found the practice harmless error or merely one factor in the broader question of coercion. App. A.

Since the federal circuit courts must universally follow this Court's condemnation of numerical inquiries in federal trials, other circuit courts may now feel free to impose the federal rule upon the states. Thus, there is a danger that countless convictions throughout the country are in jeopardy. As it is, the ruling in this case will allow hundreds of defendants throughout the Ninth Circuit to challenge the practice on collateral review.

This Court has already clarified that the Constitution does not prohibit

numerical division inquiries to a deadlocked jury. However, certiorari review by this Court is needed to prevent interference by the federal courts in the states' use of this procedure in criminal trials. The validity of state convictions are at stake.

ARGUMENT

I

CALIFORNIA'S USE OF NUMERICAL DIVISION INQUIRIES COMPORTS WITH THE REQUIREMENTS OF THE DUE PROCESS CLAUSE; THEREFORE, THE COURT OF APPEALS WAS WITHOUT AUTHORITY TO IMPOSE ITS OWN RULE ON CALIFORNIA IN OVERTURNING A CALIFORNIA CONVICTION

The California Supreme Court has determined that a judicial inquiry into the jury's division is noncoercive and entirely appropriate. In fact, that Court has expressly held that a numerical-division inquiry is "an important tool in ascertaining the probability of agreement." People v. Rodriquez, 726 P.2d 113, 142, n. 14 (1986). The California Supreme Court has also held that the Allen charge is coercive, and its use is reversible error. People v. Gainer, 566

P.2d 997 (1977).[1/] An admonishment to jurors not to surrender their individual views is permissible and is known as the cautionary portion of the Allen charge.

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1. Specifically, the California Supreme Court held it was error to give a jury an instruction which either (1) encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them; (2) states or implies that if the jury fails to agree the case will necessarily be retried; or (3) refers to the expense and inconvenience of a retrial. People v. Gainer, 566 P.2d 997, 1006, see also n. 16. After holding the Allen-type "dynamite" instruction improper, the California Supreme Court recommended the continued use of California Jury Instruction No. 17.40, which instructs jurors not to surrender their individual views in order to achieve a verdict. The Court determined that instruction advised jurors of their proper role in a manner which may assist them in their deliberations. Id., at p. 1009; CALJIC Use Note.

Allen v. United States, 164 U.S. 492 (1896).[2/]

Under the guise of due process, the United States Court of Appeals for the Ninth Circuit concluded in this case that the state trial judge impermissibly coerced the jury to render a guilty verdict when, without re-admonishing the jurors not to surrender their individual views in order to achieve a verdict, the judge inquired into the numerical division of the jury and told the jury to seek unanimity when there was only a single

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2. The term "Allen charge" is the generic name for a class of supplemental jury instructions given when jurors are apparently deadlocked. In their mildest form, these instructions carry reminders of the importance of securing a verdict and ask jurors to reconsider potentially unreasonable positions. In their stronger forms, these charges have been referred to as "dynamite charges," because of their ability to blast a verdict out of a deadlocked jury. United States v. Mason, 658 F.2d 1263, 1265, n. 1 (9th Cir. 1981).

hold-out.[3/] App. A. In short, the Ninth Circuit determined that if the state of California wishes to permit inquiries into the numerical division of deadlocked juries, the state must also give juries a portion of the Allen charge.

California submits the Ninth Circuit has ignored the limitations on federal habeas corpus jurisdiction. Due process of law is not to be turned into a destructive dogma against the states in the administration of their systems of criminal justice. Rochin v. California, 342 U.S. 165, 168 (1952).

In Brasfield v. United States, 272 U.S. 448 (1926), this Court found jury

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3. California submits the state trial judge never told the jury to seek unanimity. Instead, the trial judge requested that the jury continue to deliberate for the short time remaining that afternoon, because there had been movement during deliberations indicating the possibility of a verdict.

polling to be potentially dangerous and generally coercive. However, as acknowledged by this Court in Lowenfield v. Phelps, 484 U.S. 231, 240, n. 3 (1988), the rule in Brasfield is not one of constitutional dimension. Brasfield involved this Court's supervisory power over the conduct of federal trials, rather than the Due Process Clause or any other constitutional provision. Lowenfield v. Phelps, 484 U.S. at 240, n. 3 (1988).

Since no constitutional provision is involved in the decision to allow numerical division inquiries to a deadlocked jury, the decision to allow the inquiry is within the proper province of the supervising state court. Ellis v. Reed, 596 F.2d 1195, 1200 (4th Cir. 1979). Moreover, since this is not a constitutional question, review by the

federal courts is confined to very narrow limits.

A state criminal procedure is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Patterson v. New York, 432 U.S. 197, 201-202 (1977).

In no way is California's procedure for allowing numerical division inquiries to a deadlocked jury so "fundamentally unfair" as to offend the traditions and conscience of our people. As in this case, the procedure is used only to determine whether further deliberation would be futile or fruitful. The state trial court does not ask which way any individual jurors have voted, or whether the majority was moving toward guilt or acquittal as the votes changed. The

minority jurors are not pressured to replace their individual judgment in favor of compromise and unanimity.

Moreover, virtually every jury in California, whether deadlocked or not, is instructed prior to the beginning of deliberations not to surrender their individual views in order to achieve a verdict. California Jury Instructions, No. 17.40.[4/] The jury in this case was

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4. CALJIC No. 17.40 provides: Both the people and the defendant are entitled to the individual opinion of each juror. It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after a discussion of the evidence and instructions with the other jurors. You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a

instructed with CALJIC No. 17.40. App. A.[5/]

Since California's approval of numerical division inquiries comports with the requirements of the due process clause, the Court of Appeals was without

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majority of the jurors, or any of them, favor such a decision. App. A.

5. The Ninth Circuit found coercion in this case because the judge inquired into the jury's numerical division without admonishing the jurors a second time not to surrender their individual views in order to achieve a verdict. App. A. That conclusion was erroneous. As noted above, the jury was in fact instructed not to surrender their individual views in favor of compromise and unanimity at the beginning of deliberations. Although the trial judge did not repeat CALJIC No. 17.40 at the time of the numerical inquiry, this Court may assume the jury understood and followed the instructions given them. Francis v. Franklin, 471 U.S. 307, 324, n. 9 (1985). The fact that the jury was indeed instructed as the Ninth Circuit said it should have been makes the majority opinion especially "heavy handed."

authority to impose its own rule on California in overturning the conviction in this case.

California, Hawaii, and Washington are the states in the Ninth Circuit which approve the practice of numerical division inquiries. App. A; State v. Keaulana, 784 P.2d 328, 329 (Haw. 1989), State v. Jones, 641 P.2d 708, 712 (Wash. 1982). In addition, the Supreme Court of Hawaii has specifically rejected use of the Allen charge (State v. Villeza, 817 P.2d 1054, 1058 (Hawaii 1991)), and the state of Washington prohibits any Allen-type instruction which exerts judicial pressure upon the jurors. State v. Watkins, 660 P.2d 1117, 1122 (Wash. 1983). Without an opinion by this Court, the conflict between the states and the federal court will continue, and the Ninth Circuit will

certainly continue to overturn valid state convictions.

In addition, there is a danger that the problem will spread to states in the other circuits. Outside the Ninth Circuit, Missouri, Oklahoma, Mississippi, Texas, and Louisiana have found the practice of numerical inquiries entirely appropriate. App. A; State v. Morris, 476 S.W.2d 485, 489 (Mo. 1971); Dunford v. State, 614 P.2d 1115, 1118 (Okla. Crim. App. 1980); Sharplin v. State, 330 So.2d 591, 596 (Miss. 1976); Odom v. State, 682 S.W.2d 445, 448 (Tex. Ct. App. 1984); State v. Schamburge, 344 So.2d 997, 1001 (La. 1977). New Mexico does not encourage the practice, but has specifically found the inquiry noncoercive. State v. Rickerson 625 P.2d 1183, 1185 (N.M. 1981).

An additional eleven states have rejected the Brasfield rule of automatic

reversal. For example, Illinois and Arizona have found the practice harmless error. App. A; People v. Craddock, 516 N.E.2d 1357, 1362 (Ill. App. Ct. 1987); State v. Roberts, 642 P.2d 858, 861 (Ariz. 1982). Arkansas, Georgia, Oregon and Minnesota have found the inquiry permissible when given with supplemental instructions. App. A; Hardin v. State, 284 S.W.2d 111, 115 (Ark. 1955); Black v. State, 341 S.E.2d 436, 438 (Ga. 1986); State v. Marsh, 490 P.2d 491, 501 (Or. 1971); State v. Anderson, 78 N.W.2d 320, 326-327 (Minn. 1956). In North Carolina, Alabama, Colorado, Iowa, and Nevada the courts review the totality of the circumstances to determine whether the inquiry was coercive. App. A; State v. Bussey, 361 S.E.2d 564, 567 (N.C. 1987); Richardson v. State, 508 So.2d 289, 293-294 (Ala. Crim. App. 1987); People v.

Austin, 523 P.2d 989, 993-994 (Colo. 1974); State v. Cornell, 266 N.W.2d 15, 19 (Iowa 1978); White v. State 603 P.2d 1063, 1065 (Nev. 1979).

Although no other federal circuit court has thus far interfered to this extent with a state's use of numerical inquiries (App. A), the federal circuits universally follow this Court's condemnation of that practice for federal trials. If other circuits follow the lead of the Ninth Circuit and impose the federal rule upon the states, countless convictions throughout the country will be reversed. Therefore, California prays that this Court grant certiorari review.

II

THE COURT OF APPEALS IMPROPERLY APPLIED A "NEW RULE" FOR THE FIRST TIME ON COLLATERAL REVIEW

The Ninth Circuit specifically held that it had not announced a new rule in this case. California submits the panel decision announced a new rule of criminal procedure not dictated by precedent existing at the time petitioner's conviction became final. Thus, pursuant to Teague v. Lane, 489 U.S. 288 (1989), the panel's decision should not have been imposed retroactively on collateral review.

In Teague, this Court held a new constitutional rule of criminal procedure will not be applicable to those cases which have become final before the new rule was announced. As this Court explained, "application of constitutional rules not in existence at the time a

conviction becomes final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." Id. at 309-310.

A case announces a new rule when it breaks new ground, imposes a new obligation on the States or the Federal Government, or if the result was not dictated by precedent existing at the time the defendant's conviction became final. Id. at 301. A new decision that explicitly overrules an earlier holding obviously breaks new ground or imposes a new obligation. Butler v. McKellar, 494 U.S. 407, 414 (1990).

California's highest court has consistently approved judicial inquiries into a deadlocked jury's division, and disapproved use of the Allen charge. People v. Proctor, 842 P.2d 1100 (1992);

People v. Gainer, 566 P.2d 997 (1977). The trial judge in this case reasonably relied on that precedent during the course of the trial. Since the "new rule" principle of Teague serves to validate reasonable, good faith interpretations of existing precedents made by state courts even though they are later shown to be contrary to later decisions (Butler v. McKellar, 494 U.S. at 415; Sawyer v. Smith, 497 U.S. 227 234 (1990)), the Ninth Circuit Court of Appeal's decision that the jury's verdict was coerced because the trial judge inquired into the jury's division but failed to give a cautionary Allen charge is a new rule that should not have been imposed retroactively on collateral review.

This case is of exceptional importance. As noted by Circuit Judge Kozinski in dissent, giving the panel's

decision retroactive application will have a profound and unsettling effect on hundreds of convictions entered by the courts in California and other states in the Ninth Circuit. Retroactive application of the Court's opinion will significantly impair the states' legitimate interests in maintaining convictions secured through procedures their courts reasonably believed conformed with due process. App. A. Therefore, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON, Chief Assistant
Attorney General
CAROL WENDELIN POLLACK, Senior
Assistant Attorney General
LINDA C. JOHNSON, Supervising
Deputy Attorney General

Sharon Wooden Richard

*SHARON WOODEN RICHARD,
Deputy Attorney General

Attorneys for Petitioners
*Counsel of Record

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APPENDIX "A"

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREGORIO JIMINEZ,	)	No. 91-56476
	)	
Petitioner-Appellant,	)	D.C. No.
	)	CV 90-0419-GLT
v.	)	
	)	OPINION
E.R. MYERS, Warden; Attorney General of California,	)	
	)	
Respondents-Appellees.	)	

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Argued and Submitted
March 2, 1993--Pasadena, California

Filed December 8, 1993

Before: James R. Browning, Procter Hug, Jr., and Alex Kozinski, Circuit Judges.

Per Curiam; Dissent by Judge Kozinski

SUMMARY

Criminal Law and Procedure/Juries/Jury Instructions

The court of appeals reversed a district court judgment. The court held that a trial judge impermissibly coerced a jury, which had declared itself to be at an impasse, to render a guilty verdict when, without admonishing the jurors not to surrender their individual views in order to achieve a verdict, the judge repeatedly inquired into the numerical division of the jury and told the jury to seek unanimity when there was only a single hold-out.

During deliberations in petitioner Gregorio Jimenez's criminal trial, a jury sent the state trial judge a note stating that they felt strongly that they would be unable to reach a verdict. The court called in the jury, and asked the foreperson for its numerical split. The

foreperson replied "nine to three." The court asked if there had been any movement one way or the other. After the foreperson stated that there had been movement, the court sent the jury back for further deliberations.

The jury later sent another note to the court, stating that they were at an impasse. The court again asked for the numerical split. Noting that there had been movement, the court stated: "Due to the fact we have had that type of movement, I would request, then, to finish the rest of today." After one hour and 48 minutes of deliberation, the jury returned a verdict of guilty.

After unsuccessfully raising the issue of jury coercion to the California Court of Appeal and seeking review by the California Supreme Court, Jimenez filed a petition for a writ of habeas corpus,

claiming that the state trial judge coerced the jury into rendering a guilty verdict in violation of his right to due process. The district court denied the petition, finding that the hold-out juror would not have felt coerced because he or she would have known that the judge would declare a mistrial at the end of the day. Jimenez appealed the denial of his petition.

[1] The trial judge twice asked the jury for their numerical split on the merits, and both times sent the jury back for further deliberations on the stated ground that there had been movement toward unanimity. The court indicated its approval of the movement, and expressed the hope that it would continue. The form of the exchange placed pressure on the hold-out jurors to

join the others in the movement toward unanimity.

[2] In cases where a trial judge's actions and comments place pressure on hold-out jurors, the judge must remind the jurors of their duty not to surrender conscientiously held beliefs in order to secure a verdict. [3] In this case, the trial judge failed to admonish the jury not to surrender their sincere convictions. The fact that the court asked the jury to continue to deliberate only for the balance of the day was not enough to remove the pressure on the hold-out juror.

[4] Thus, the state trial judge violated Jimenez's due process rights by impermissibly coercing the jury to render a guilty verdict.

Circuit Judge Kozinski dissented, noting that California has determined that

a judicial inquiry into the jury's division is noncoercive and entirely appropriate. Moreover, even if adopted, the majority's approach should not be applied retroactively to any state prisoner whose conviction has become final; in a plurality opinion, the Supreme Court held that where federal courts adopt a new rule as a concomitant of due process, the rule must, except in rare cases, be applied only prospectively.

COUNSEL

Howard C. Cohen, Appellate Defenders, Inc., San Diego, California, for the petitioner-appellant.

Peggy S. Ruffra, Deputy Attorney General, Los Angeles, California, for the respondents-appellees.

OPINION

PER CURIAM:

Gregorio Jimenez appeals the district court's denial of his petition for a writ of habeas corpus based on the claim that the state trial judge coerced the jury into rendering a guilty verdict in violation of Jimenez's Fourteenth Amendment right to due process.

I.

Jimenez fired two shots through the front door of his cousin's house after she ran inside following an argument. He was convicted of attempted murder. At trial he claimed he intended only to frighten his cousin and had not fired until he believed she had moved away from the door. In an effort to gain an acquittal, Jimenez and his counsel made a "tactical decision . . . not to seek any lesser included offenses or submit instructions thereon

for the jury's consideration." In addition to describing the elements of attempted murder and giving other standard charges, the court instructed the jury that each juror should decide the case after discussion, but without succumbing to the pressure of the majority.[1/]

After four and three quarter hours

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1. The court stated,

> Both the people and the defendant are entitled to the individual opinion of each juror.
>
> It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after a discussion of the evidence and instructions with the other jurors.
>
> You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.

of deliberations, the jury sent the judge a note stating, "We are unable to reach a verdict and feel strongly that we would not be able to reach a verdict." Defense counsel took the position that "[i]n a case like this with this type of emotions and feelings, if they're deadlocked now, they're rarely going to change." The court called in the jury and engaged in the following exchange with the foreperson:

> THE COURT: What I would like to know, how many votes have been taken?
>
> FOREPERSON: Five or six.
>
> THE COURT: Without telling me which direction, just numerically, how did it start, and what was it on the last?
>
> FOREPERSON: [I will] Try to tell you numerically without

[indicating] either way. To the best of my recollection, it started out about maybe seven to five, eight to four. Went to nine to three. All right. To back up, this morning, nine, two, and one. . . . This afternoon though, nine to three.

* * *

THE COURT: All right. So you did have -- how about in between, nine-two and one and then nine-three, has there been any movement one way or the other?

FOREPERSON: Nine-one-two, I would say at this point. And yes, there has been some movement in one direction.

THE COURT: Okay. Well,

> that's what's important to me because of the nature of the type of case. I want to find out that there has been movement.

After a three-day weekend, the jury returned to its deliberations. Three hours later, the jury sent another note to the court stating, "We are at an impasse and request further direction." The prosecutor responded, "If the impasse means that they're once again hopelessly hung, perhaps now would be the time to accept that and set it for retrial." Defense counsel agreed, "Any further pressure upon [the jury] would be prejudicial to the defendant." The court declared it would bring the jurors back to the courtroom to "see if there's been any substantial movement at all. If there has

not been, then I'll have to declare a mistrial."

The court's questions to the jury and the foreperson's responses were as follows:

THE COURT: Okay. Now last Friday I inquired of you as to whether or not there had been any movement by the jury. So I'll ask you that same question again with the understanding, all I want is numbers, not which direction you're at. How many votes have you taken since last Friday?

FOREPERSON: Two or three. Two.

COURT: Two more?

FOREPERSON: Un-huh.

COURT: What's the latest?

FOREPERSON: Eleven-one.

COURT: So there has been, then, substantial movement since the last time.

FOREPERSON: Yes.

THE COURT: All right. Due to the fact we have had that type of movement, I would request, then, to finish the rest of today and see where we are at that point in time. All right? Okay.

Defense counsel objected and asked the court to inquire whether further deliberation would be fruitful. Counsel explained, "if there's one person in there that's for not guilty, it's putting them on a tremendous amount of pressure, and I don't think they should be subjected to that pressure." The court concluded the hold-out juror would not be subjected to "undue pressure" in light of the substantial change in the vote within the jury in the course of their deliberations and because the jury had been asked to

deliberate "the rest of today" -- about two more hours. The jury returned a guilty verdict after an hour and forty-eight minutes of additional deliberation.

Jimenez raised the issue of jury coercion without success on appeal to the California Court of Appeal and in a petition for review to the California Supreme Court. Jimenez then filed this petition for a writ of habeas corpus.

The magistrate judge recommended the writ be granted on the ground the state trial judge had coerced the hold-out juror into joining in the guilty verdict. The magistrate judge noted that the state trial judge twice polled the jury about the jury's numerical division on the merits after the jury had announced an impasse; that the prosecution and defense agreed to accept a deadlock after the jury's second note, but the court refused;

and that the judge's comments to the jury strongly implied the jury's movement from an initial division of seven to five to a division of eleven to one should continue toward unanimity. The district court disagreed, stating, inter alia, that the hold-out juror would not have felt coerced because he or she would have known the judge would declare a mistrial at the end of the day.

Whether the trial judge coerced the jury into rendering a guilty verdict is a mixed question of law and fact "requiring the application of legal principles to the historical facts." *Hamilton v. Vasquez*, 882 F.2d 1469, 1471 (9th Cir. 1989). Accordingly, our review of the "legal weight" given to the facts is de novo. *See Sumner v. Mata*, 455 U.S. 591, 597 & n.10 (1982); *Hamilton*, 882 F.2d at 1471; *Torrey v. Estelle*, 842 F.2d 234, 235 (9th

Cir. 1988). We consider whether the court's actions were coercive under a totality of the circumstances test. *See United States v. Seawell*, 550 F.2d 1159, 1163 (9th Cir. 1977) ("the general test of whether a supplemental jury instruction is in error is to consider all the circumstances to determine if the instruction was coercive"); *Marsh v. Cupp*, 536 F.2d 1287, 1290 (9th Cir. 1976) (test for jury coercion is "'whether in its context and under all the circumstances of this case the statement was coercive'").[2/]

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2. Other circuits apply the same test. *E.g.*, *Williams v. Parke*, 741 F.2d 847, 850 (6th Cir. 1984) (totality of circumstances); *Cornell v. Iowa*, 628 F.2d 1044, 1048 (9th Cir. 1980) (same); *Ellis v. Reed*, 596 F.2d 1195, 1197-1200 (4th Cir. 1979) (same). The totality of the circumstances standard had its origin in *Jenkins v. United States*, 380 U.S. 445 (1965). In reversing a conviction obtained after the judge told the jury it was required to reach a verdict, the

Although this case does not specifically involve review of an *Allen* charge, *see Allen v. United States*, 164 U.S. 492 (1896), clearly our *Allen* charge cases are relevant. They consider four factors in determining whether there has been undue coercion:

1) the form of the supplemental instruction;

2) the period of deliberations following the instruction;

Supreme Court stated, "Upon review of the record, we conclude that in its context and under all the circumstances the judge's statement had the coercive effect attributed to it." *Id.* at 446. *See Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988) ("Our review of petitioner's contention that the jury was improperly coerced requires that we consider the supplemental charge given by the trial court `in its context and under all the circumstances.'") (quoting *Jenkins); Seawell*, 550 F.2d at 1163 (citing *Jenkins); Marsh*, 536 F.2d at 1290 & n. 6 (same).

3) the total time of deliberations;

4) any indicia of coerciveness or pressure.

United States v. Wauneka, 842 F.2d 1083, 1088 (9th Cir. 1988). We consider the same factors in this case to determine whether, under the totality of the circumstances, the trial judge coerced the jury. We recognize, however, that coercion must be more severe to constitute a violation of due process than to invoke our supervisory powers. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 642-43 (1974).

[1] 1) *The Form of the Exchange Between Judge and Jury* -- the jury twice informed the trial judge it had reached an impasse. The trial judge twice asked for their numerical split on the merits, and both times sent the jury back for further

deliberations on the stated ground there had been movement toward unanimity. The court indicated its approval of the movement and expressed the hope it would continue. The form of the exchange placed pressure first on the three hold-out jurors, and finally on the single hold-out juror, to join the others in the movement toward unanimity.

[2] Because an *Allen* charge carries the potential for jury coercion, we require a trial judge using the charge to instruct jurors not to surrender their sincere convictions when they reassess their positions. *United States v. Bonam*, 772 F.2d 1449, 1451 (9th Cir. 1985); *United States v. Mason*, 658 F.2d 1263, 1268 (9th Cir. 1981) ("the integrity of individual conscience in the jury deliberation process must not be compromised"). Although the trial judge

in this case placed pressure on the hold-out jurors to reconsider their views, he did not remind them no juror "should be influenced to decide any question in a particular way because a majority of the jurors . . . favor such a decision." [3] "It is essential [in cases where the trial judge's actions and comments place

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3. At oral argument, the State seemed to suggest the trial court could not repeat the cautionary admonition because the California Supreme Court has prohibited use of the coercive portion of the *Allen* charge. The California court has prohibited use of any supplemental charge that (1) directs minority or hold-out jurors to reconsider their views in light of the majority, (2) informs the jury that the case will be retried and decided eventually, or (3) informs the jury of the expense and inconvenience of retrial, *People v. Barraza*, 591 P.2d 947 (Cal.1979); *People v. Gainer*, 566 P.2d 997, 1003-06 & n.16 (Cal. 1977), but also has permitted California trial courts to provide supplemental instructions reminding jurors not to surrender their convictions simply because a majority of jurors has taken a different view of the case, *People v. Sheldon*, 771 P.2d 1330, 1343-44 (Cal.1989); *People v. Keenan*, 758 P.2d 1081, 1113-18 (Cal. 1988).

pressure on hold out jurors] to remind jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party." *Mason*, 658 F.2d at 1268.

2) *Period of Deliberation After the Exchange* -- The jury reached its verdict one hour and forty-eight minutes after returning to deliberations following the second note. [4] This period does not raise an inference of coercion. *Compare Bonam*, 772 F.2d at 1451 (no inference of coercion for verdict delivered an hour and a half after *Allen* charge where issue was simple and jury told it could take as much time as it needed), *with United States v. Contreras*, 463 F.2d 773, 774 (9th Cir.

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4. Jimenez filed a motion that we take judicial notice of the trial minutes. They are part of the state court record and available for review without a motion.

1972) (reversing a conviction rendered thirty-five minutes after an *Allen* charge because the instruction was premature and coercive).

3) *Total Time of Deliberations* -- The jury deliberated a total of nine and a half hours. This was not "so disproportionate to the task before the jury as to raise an inference" of coercion. *United States v. Beattie*, 613 F.2d 762, 766 (9th Cir. 1980).

[3] 4) *Indicia of Coerciveness or Pressure* -- The trial judge knew the jury was divided nine to three when he told them to continue their deliberations after their initial impasse; he knew they were divided eleven to one after the second impasse. The trial judge, as we have already said, failed to admonish them not to surrender their sincere convictions.

The fact that the court asked the jury to continue to deliberate only for the balance of the day was not enough to remove the pressure on the hold-out juror. The court made clear it approved of the jury's movement toward unanimity and indicated "that type of movement" should continue, but did not suggest to the jury in any way that the court would declare a mistrial if no verdict was returned by the end of the day. After the second impasse, both the prosecutor and the defense believed a new trial was required.

This case is analogous to *Jones v. Norvell*, 472 F.2d 1185 (6th Cir. 1973). The court vacated a state conviction after the trial judge learned the jury was deadlocked eleven to one, informed the jury it was their duty to reach a verdict, and told the jury to try to make progress in their deliberations. The jury returned

a guilty verdict almost immediately. The Sixth Circuit said,

> the facts recited above involved the invasion of jury secrecy, the identification of a deadlocked jury's majority-minority count, a coercive jury charge, and the speedy return of a verdict subsequent to the charge. These facts constitute a totality of circumstances which violate the constitutional rights of appellants to a fair and impartial jury trial under the Sixth and Fourteenth Amendments.

Id. at 1186 (citations omitted). Although in the present case the jury was not told it had a duty to reach a verdict, the judge's comments, twice repeated, clearly

conveyed the message that the hold-out juror should promptly join the majority.

[4] If this were a federal case subject to our supervisory powers, the trial judge's first inquiry into the numerical division of the jury would have required reversal. *Brasfield v. United States*, 272 448 (1926). Since *Brasfield's* per se rule rests on the supervisory power, it does not apply in federal habeas review. *Lowenfield v. Phelps*, 484 U.S. 231, 239-40 & n.3 (1988); *Locks* v. *Sumner*, 703 F.2d 403, 406 (9th Cir. 1983). Upon review of the totality of the circumstances of this case, however, including the facts that the court repeated the inquiry into the numerical division of the jury, told the jury it should seek unanimity when there was only a single hold-out, and failed to admonish individual jurors not to surrender their

individual views simply to achieve a verdict, we conclude the state trial judge violated Jimenez's due process rights by impermissibly coercing the jury to render a guilty verdict.[5]

Reversed.

KOZINSKI, Circuit Judge, dissenting.

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5. We announce no "new rule as a concomitant of due process," as the dissent suggests, but simply apply the well-established "totality of the circumstances" test. *Teague v. Lane*, 489 U.S. 288 (1989) does not apply.

As federal judges, we're subject to a peculiar myopia: We tend to see the federal way of doing things as the best way, often as the be-all and end-all of due process. This preference for the familiar is understandable enough, but it carries with it special dangers when we review state convictions for constitutional error. There are many ways of giving a defendant a fair trial. We sap our federal system of vitality and creativity when we strike down state procedures because they differ from our own.

This is a case in point. Not everyone agrees on how to deal with a jury that indicates it's deadlocked. The jury shouldn't keep deliberating if unanimity is beyond reach, but it ought not to be discharged if there's a reasonable possibility of reaching

agreement. To resolve this tension, most federal courts, as well as some state courts, give an *Allen* charge -- a fairly coercive instruction that tells jurors to go back and try again. The *Allen* charge has been subject to much criticism, however, and many courts have either modified or rejected it, the California Supreme Court among them.[1/] *People* v. *Gainer*, 19 Cal.3d 835 (1977), held that the *Allen* charge is inherently coercive and thus reversible error. In its place, the California Supreme Court approved a neutral inquiry into the jury's numerical division as "an important tool in ascertaining the probability of

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1. Even the federal courts are far from unanimous on how to deal with jury deadlock. While we allow the *Allen* charge in its original form, *see United States v. Seawell*, 583 F.2d 416 (9th Cir. 1978), the Third Circuit has forbidden it altogether, see *United States v. Graham*, 758 F.2d 897 (3d Cir. 1985).

agreement." *People* v. *Rodriguez*, 42 Cal.3d 730, 776 n.14 (1986). It has repeatedly refused to reconsider this practice. *See, e.g., People* v. *Price*, 1 Cal.4th 324, 467 (1991); *People* v. *Proctor*, 4 Cal.4th 499, 539 n. 7 (1992). Confronted with a possible jury deadlock, the state trial judge here did precisely what his state supreme court told him to: He asked the foreperson about the jury's division. Upon learning there'd been movement in one direction, he exercised the discretion entrusted to him and sent the jury back for further deliberations. Later, when the jury again declared itself deadlocked, the judge again followed his supreme court's instructions and asked the foreperson for a division. Learning that the jury had moved even closer to agreement, the trial judge again exercised his judgment and sent

them back to deliberate. He turned out to be right: The jury returned a verdict later that day.

By overturning the conviction so obtained, my colleagues are casting serious doubt on a procedure the California Supreme Court and a number of other state supreme courts have approved for dealing with apparent jury deadlock. My colleagues hold that the practice of asking for a jury's division is so inherently coercive it renders a trial fundamentally unfair when combined with even the trivial comments the trial judge made here. This ruling bodes ill for countless convictions in California and other states that follow the California practice. *See* pp. 13782-13784 *infra*.

My colleagues give no persuasive reason for such heavy-handed interference with the power of state supreme courts to

resolve difficult issues of trial practice. Today's ruling moves us one step farther away from a truly federal system where the state courts serve as laboratories for shaping the flexible and evolving standards of due process. It moves us one step closer to a world where our way of doing things becomes the only way, where state courts dare not deviate from our procedures lest they risk wholesale invalidation of their convictions.

A. First things first. The majority overturns the conviction here because it finds the trial judge's actions unduly coercive. We should pause to ask whether the coercion of a few holdout jurors in a state criminal trial can ever violate due process. Jury coercion violates due process in a federal criminal trial because the

defendant there is constitutionally entitled to a unanimous jury. *Johnson* v. *Louisiana*, 406 U.S. 356, 371 (1972) (Powell, J., concurring). Coercion of holdout jurors impairs the federal defendant's Sixth Amendment right to a fair trial because it casts doubt on whether the jury was unanimous. But the defendant in a state criminal trial has no constitutional right to a unanimous jury; an 11-1, 10-2 or even 9-3 guilty verdict is consistent with due process. *Id.* at 363 (majority opinion). If a state can dispense with the concurrence of one, two, three -- perhaps even more -- holdout jurors altogether, why can't it try to secure the agreement of those same jurors through moral suasion?[2/] The

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2. The matter might be different if the jury has made it clear it's leaning towards a conviction; jurors might then interpret a nudge towards unanimity as a

latter procedure seems an *a fortiori* case of the former.

Nor is jury coercion inherently prejudicial to the defense. Our perception of this may be distorted because every time we see jury coercion, the jury has convicted; it's easy to conclude that coercion always harms defendants. But pressuring holdout jurors is just as likely to lead to an acquittal as to a conviction, depending on the direction the jury is leaning. When judicial pressure is applied without regard to whether the jury favors a conviction or an acquittal, it's hard to say this denies the defendant a fair

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hint that the judge believes the defendant is guilty. If the judge "urge[s] his own view of the guilt or innocence of the accused," he may interfere with the defendant's right to a trial by the jury. *Billeci* v. *United States*, 184 F.2d 394, 403 (D.C. Cir. 1950).

trial.

Finally, it might be argued that if a defendant is entitled to a unanimous jury as a matter of state law, it violates due process to let the judge coerce the holdout jurors. But it all turns on how state law defines unanimity. Some states view unanimity in the same pristine fashion as the federal courts; others may temper the concept, allowing some pushing and tugging to get there. It surely doesn't violate due process for state law to define unanimity more flexibly than federal law.

The Supreme Court has, nevertheless, suggested that jury coercion in a state trial can violate due process. *See Lowenfield* v. *Phelps*, 484 U.S. 231, 241 (1988). Absent more specific guidance it's probably safest to assume it does. But in deciding how bad

jury coercion is -- and how much leeway to allow states in dealing with apparently hung juries -- we must keep in mind the teachings of cases like *Johnson*, *Williams* v. *Florida*, 399 U.S. 78 (1970) (12-person jury is not a constitutional requirement), and *Cupp* v. *Naughten*, 414 U.S. 141 (1973) (jury instruction universally condemned in federal courts is not unconstitutional), which guarantee states a good deal of latitude in conducting jury trials.

B. Even if we assume jury coercion violates due process, we must next ask whether what happened here was coercive. Ever since the Supreme Court's ipse dixit in *Brasfield* v. *United States*, 272 U.S. 448 (1926), the federal courts have taken it as an article of faith that a judicial inquiry into the jury's division is coercive. But *Brasfield* didn't explain

why it found this practice coercive nor is the reason immediately apparent. After all, asking the jury how it's divided carries with it no explicit message; it exhorts the jurors to do nothing at all. I suppose the inquiry could be understood as denoting some judicial impatience, perhaps some veiled suggestion that jurors in the minority give in to their peers. *Brasfield's* determination that holdout jurors will perceive and be swayed by such a hidden message is less law than psychology, more a guess than a fact. One could conclude just as easily that the inquiry is not coercive because the jury will read nothing into it.

A number of states take this view. California is but one of seven states to have determined that a judicial inquiry into the jury's division is noncoercive

and entirely appropriate. *See State* v. *Keaulana*, 784 P.2d 328 (Haw. 1989); *State* v. *Jones*, 641 P.2d 708 (Wash. 1982); *State* v. *Morris*, 476 S.W.2d 485 (Mo. 1971); *Dunford* v. *State*, 614 P.2d 1115 (Okla. Crim. App. 1980); *Sharplin* v. *State*, 330 So. 2d 591 (Miss. 1976); *State* v. *Rickerson*, 625 P.2d 1183 (N.M. 1981). To this group, two other states can be added that also seem to approve the practice. *See Odom* v. *State*, 682 S.W.2d 445, 448 (Tex. Ct. App. 1984) (defendant "has not cited a Texas case, nor have we found one, which makes the mere inquiry as to the numerical division of the jury reversible error per se"); *State* v. *Schamburge*, 344 So. 2d 997, 1001 (La. 1977) ("The trial judge did no more than make a general inquiry as to prospects for a verdict and reminded the jury that

ten of the twelve had to agree upon a verdict.").

Another group of states -- seven by my count -- condemns the practice summarily. *See Gumer* v. *Commonwealth*, No. 85-CA-1923-MR (Ky. Ct. App. April 25, 1986); *Graham* v. *State*, 601 A.2d 131 (Md. 1992); *Hyman Reiver & Co.* v. *Rose*, 147 A.2d 500 (Del. 1958); *People* v. *Wilson*, 213 N.W.2d 193 (Mich. 1973); *Rodriguez* v. *State*, 559 So.2d 678 (Fla. Ct. App. 1990); *Kersey* v. *State*, 525 S.W.2d 139 (Tenn. 1975); *State* v. *George*, 711 P.2d 1379 (Mont. 1986). They rely on *Brasfield* or a closely analogous rationale.

An additional eleven states have addressed the issue but do not have a clear-cut position. Among them are states like North Carolina, which find that "[s]uch inquires are not inherently

coercive . . . ." *State* v. *Bussey*, 361 S.E.2d 564, 567 (N.C. 1987). States like Illinois and Arizona disapprove the inquiry but consider it harmless. *People* v. *Craddock*, 516 N.E.2d 1357, 1362 (Ill. App. Ct. 1987); *People* v. *Kirk*, 394 N.E.2d 1212, 1218 (Ill. App. Ct. 1979); *State* v. *Roberts*, 642 P.2d 858, 861 (Ariz. 1982). A substantial number mention, but make no adverse comment on, the trial judge's inquiry into the jury's division, and focus instead on supplemental *Allen*-type instructions. *See State* v. *Marsh*, 490 P.2d 491, 501 (Or. 1971); *Hardin* v. *State*, 284 S.W.2d 111, 114 (Ark. 1955); *Black* v. *State*, 341 S.E.2d 436 (Ga. 1986); *State* v. *Anderson*, 78 N.W.2d 320, 326-27 (Minn. 1956). Some states adopt a balancing approach, considering the inquiry as part of a broader question of coercion. *Richardson*

v. *State*, 508 So.2d 289, 293-94 (Ala. Crim. App. 1987); *People* v. *Austin*, 523 P.2d 989, 993-94 (Colo. 1974); *State* v. *Cornell*, 266 N.W.2d 15, 19 (Iowa 1978); *White* v. *State*, 603 P.2d 1063, 1065 (Nev. 1979).

In determining whether a particular state court procedure violates due process, it's highly relevant whether that state is alone in its view. While a deviation from the norm doesn't automatically offend the Constitution, failure to follow the collected wisdom of other American jurisdictions can raise doubts about whether the procedure is consistent with due process.[3/] The

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3. The converse isn't necessarily true; a procedure might violate due process even though a substantial number of states follow it. Yet, in determining whether an inquiry into numerical division is coercive, it surely matters that a significant number of state supreme courts have considered the

Supreme Court's analysis in *Beck* v. *Alabama*, 447 U.S. 625 (1980), illustrates this point. *Beck* held that the defendant in a capital trial is entitled, as a matter of due process, to a lesser included offense instruction. The Court reasoned that "the nearly universal acceptance of the rule in both state and federal courts [as a matter of statutory or common law] establishes the value to the defendant of this procedural safeguard." *Id.* at 637. There is no such universal agreement that a judicial inquiry into a jury's division is coercive. The majority's assumption to the contrary -- which lies at the heart of its ruling -- is without support.

C. Even assuming the judge's inquiry into the jury's division and his

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procedure and held it isn't.

related comments were coercive, we must next ask *how* coercive. My colleagues recognize that "coercion must be more severe to constitute a violation of due process than to invoke our supervisory powers," Maj. op. at 13775, but they then stand this admonition on its head. The cautionary part of the *Allen* charge -- the absence of which the majority sees as the great failing here -- is designed to offset the coercive part of the charge. Thus, in order to vacate a state conviction for failure to give a cautionary reminder, the judge's actions here had to be more coercive than the dynamite part of the *Allen* charge.

By any standard, what happened here -- if it was coercive at all -- was much less coercive than the typical *Allen* charge, where the trial judge looks the holdout jurors in the eye and says:

There is no reason to think that this case could be better tried or that another jury is better qualified to decide it. It is important therefore that you reach a verdict if you can do so conscientiously. Therefore, if it looks at some point as if you may have difficulty in reaching a unanimous verdict and if the greater number of you agreed on a verdict, the other jurors may want to ask themselves about the basis for their feelings when a substantial number have reached a different conclusion. You should therefore . . . not hesitate to reconsider your views from time to time and to change them if you are persuaded that this is appropriate. It is important that you attempt to return a verdict . . . .*United States* v. *Ajiboye*, 961 F.2d

892, 893 n.1 (9th Cir. 1992).

Contrast what happened here: The trial judge asked the jury to tell him how badly they were split and whether there'd been any movement. His comments were relatively mild, more by way of explanation than exhortation. After the first inquiry, when he learned the jury was moving toward unanimity, the judge said: "Well, that's what's important to me because of the nature of the type of case. I want to find out that there has been movement." His comment after the second inquiry was entirely neutral: "All right. Due to the fact we have had that type of movement, I would request, then, to finish the rest of today and see where we are at that point in time. All right? Okay."

What happened here simply is not on a par with -- let alone more coercive

than -- the dynamite portion of the *Allen* charge. The majority errs even according to the standard it has set for itself.

D. Even were we to adopt the majority's approach today, we would have no business applying it retroactively to petitioner or to any other state prisoner whose conviction has become final. The Supreme Court in *Teague* v. *Lane*, 489 U.S. 288 (1989) (plurality opinion), held that were the federal courts adopt a new rule as a concomitant of due process, the rule must -- except in rare cases -- be applied only prospectively.[4/] The reasons for this are amply demonstrated

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4. There are two exceptions to this general rule: if the rule places "certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe;" or if it requires the observance of "those procedures that . . . are `implicit in the concept of ordered liberty.'" 489 U.S. at 307 (citations omitted). It goes without saying that neither applies here.

by the case before us: What the trial judge did here wasn't an aberration; he followed a practice the California Supreme Court had approved repeatedly. Giving today's rule retroactive application will have a profound and unsettling effect on hundreds of convictions entered by the courts of California and other states in this circuit. In many cases, there will be no hope of retrying the defendants. Retroactive application of the new rule thus significantly impairs these states' legitimate interests in maintaining convictions secured through procedures their courts reasonably believed conformed with due process.

That the rule the majority adopts is new can hardly be doubted. No federal court -- no court anywhere -- has held that a state judge's inquiry into a

jury's numerical division is sufficiently coercive to require an *Allen*-type cautionary instruction. The only case the majority cites, *Jones* v. *Norvell*, 472 F.2d 1185 (6th Cir. 1973), involved not an inquiry as to division alone but, as my colleagues acknowledge, an instruction that "it was [the jury's] duty to reach a verdict." Maj. op. at 13777. Reliance on *Jones* is particularly misplaced in light of the Sixth Circuit's own limited reading of it in *Williams* v. *Parke*, 741 F.2d 847 (6th Cir. 1984). The *Williams* court confronted a situation far more egregious than that here: a state trial court that had not only inquired into the jury's division, but given a truncated *Allen* charge -- one that was all coercion and no cautionary reminder. *Id.* at 849, 851; *see also id.* at 853 (Contie, J., dissenting). The court distinguished

Jones on the ground that, "in *Jones*, the trial judge determined not only the jury breakdown, but also the majority's inclination." *Id.* at 851. In addition, "the judge in *Jones* . . . wrongly asserted that the twelve people of the jury `are the only ones' who could reach a verdict in the case, thus appearing to assert the impossibility of retrial." *Id.* at 851-52.

Sixth Circuit case law can more fairly be characterized as conflicting with the majority's opinion than supporting it. If the inquiry as to division plus the coercive portion of the *Allen* charge didn't violate due process in *Williams*, the trial judge's neutral

inquiries and oblique comments here surely did not.

Other federal circuits have

uniformly rejected the kind of claim the majority sustains here. *Ellis* v. *Reed*, 596 F.2d 1195 (4th Cir. 1979), dealt with a situation where the judge had asked about the jury's division, and was told "eleven to one." He then gave a fairly strong version of the *Allen* charge, reminding the jurors that if they could not agree "the time of the Court will again have to be consumed in the trial of this action;" that "it is your duty to try to reconcile your differences and to reach a verdict;" that "a mistrial will mean that another jury will have to be selected to hear this case and evidence again; and it's long and complicated;" and finally that "I want to emphasize the fact that it is your duty to do whatever you can to reason this matter over as reasonable men and women and attempt to reconcile your differences . . . ." *Id.*

at 1196. The jury reached agreement in eight minutes. *Id.* By any standard, the coercion in *Ellis* was far more severe than anything that happened here.

Although the state trial judge did include a brief cautionary instruction, the approach of *Ellis* surely diverges from that of the majority here. *Ellis* grounded its analysis on the Supreme Court's rulings in *Johnson*, *Williams* and *Cupp* and concluded that these are matters that should be left to the state courts:

> We are of the opinion that the injury is essentially procedural in nature, absent any overt coercion upon the minority jurors. In any event, the jury knew how it was divided . . . . [W]e feel that under the principles of federalism the decision

> whether to allow the inquiry is best left to the supervising state court. Indeed, we have expressed the opinion that there is some value to the inquiry in a federal case when the trial judge is deciding whether to declare a mistrial or otherwise excuse the jurors for dinner.

Id. at 1200. Nothing in the Fourth Circuit's opinion paves the way for our ruling today.

The Seventh Circuit took a similarly narrow view of the federal prerogatives in this area. In *United States ex rel. Kirk v. Director, Dept. of Corrections*, 678 F.2d 723 (7th Cir. 1982), the court confronted the petitioner who'd been the defendant in

People v. *Kirk*. *See* p. 13783 *supra*. In *Kirk*, the Illinois Court of Appeals held that the inquiry into jury division was error but harmless. The Seventh Circuit characterized the case as involving an inquiry into jury division followed by a modified *Allen* charge, although neither its opinion nor that of the Illinois appellate court discloses the exact nature of the charge.[5/] The Seventh Circuit rejected the argument that an inquiry as to jury division was inherently coercive; the court didn't focus on whether the trial judge reminded the jurors of their duty not to give up

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5. *People* v. *Kirk* says that the trial judge gave a *Prim* instruction. In *People* v. *Prim*, 289 N.E.2d 601 (Ill. 1972), the Illinois Supreme Court approved the use of the ABA recommended instruction in lieu of the standard *Allen* charge. The ABA instruction contains a milder form of the *Allen* dynamite charge, as well as a cautionary reminder. *Id.*

honestly held beliefs. Instead, the court held that the inquiry had to be considered in light of all the circumstances of the case, and that the defendant had shown nothing to suggest the inquiry was coercive. *Kirk* surely does not foreshadow the result here for purposes of *Teague*.

The Eighth Circuit dealt with the issue in *Cornell* v. *State*, 628 F.2d 1044 (8th Cir. 1980), reviewing the ruling of the state court in *State* v. *Cornell*, 266 N.W.2d 15 (Iowa 1978). *See* p. 13783 *supra*. In *Cornell*, the trial judge asked how the jury was divided after more than 15 hours of deliberation, and was told 7 to 5. At that point, the trial court gave a lengthy *Allen*-type charge that can best be described as 95% dynamite and 5%

caution.[6/] The Eighth Circuit denied relief, noting that "neither the inquiry nor the *Allen* charge, nor the two in combination, was coercive of the jury's ultimate verdict of guilty." *Cornell*, 628 F.2d at 1048. *Cornell*, like *Ellis*, is difficult to square with our ruling

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6. The only portion of the instruction which can be deemed cautionary is the following phrase: "[W]hile this verdict must be the conclusion of each juror and not a mere acquiescence of the jurors in order to reach agreement . . . ." *Cornell*, 628 F.2d at 1046. This was sandwiched between a variety of exhortations such as: "A proper regard for the judgment of others will greatly aid us in forming our own judgment," and "there is no reason to think a jury better qualified could ever be chosen," and "if the members of the jury differ in their views of the evidence, such difference of opinion should cause them all to scrutinize the evidence more closely and to reexamine the grounds of their opinion," and "your duty is to decide the issues of fact which have been submitted to you, if you can conscientiously do so," and "you should lay aside all mere pride of opinion and should bear in mind that the jury room is no place for espousing and maintaining in a spirit of controversy."

today and is arguably in direct conflict. It certainly in no way presages our decision for purposes of Teague.

Finally, there's our prior ruling in *Locks* v. *Sumner*, 703 F.2d 403 (9th Cir. 1983), which involved an inquiry as to numerical division, apparently not followed by any comment from the trial judge. *Id.* at 405 n.1. We upheld the conviction; citing *Cornell*, *Ellis* and *Cupp*, we concluded:

> Here, the circumstances in which the inquiry was made do not persuade us that the jury was in any way coerced: The jury was about to be dismissed for the weekend and the judge may have been wondering whether it was close to agreement, making it best to continue

> deliberations; he made a simple and, on its face, uncoercive inquiry; he did not ask whether the jurors in the majority were for acquittal or a guilty verdict; the judge did not follow the inquiry with any statement imploring the jury to come to a decision; and the jury was not sent back to continue deliberations, but was dismissed for the weekend. We therefore affirm the district court on this issue.

Id. at 407. If *Locks* is not actually in conflict with our opinion today, it surely contains no suggestion, no hint, that an *Allen*-type cautionary reminder is

required whenever the judge asks the jury how it's divided.[7]

The long and the short of it is that today's decision is out of step with those of other federal courts. It's the first case anywhere that equates a neutral inquiry into the jury's division with the dynamite portion of an *Allen* charge; it is the first federal court to reverse a state conviction under these circumstances. If *Teague* does not bar retroactive application in these circumstances, it has no meaning at all.

E. The Supreme Court has repeatedly

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7. Also relevant is *United States* v. *Akbar*, 698 F.2d 378 (9th cir. 1983), cited in *Locks*. In *Akbar*, the district judge conducted an unusual jury poll to determine which jurors wanted certain testimony reread. During the course of that procedure, the judge learned not only that the jury was split 11 to 1, but also the identity of the holdout juror. There was no cautionary instruction, yet the court reluctantly affirmed. *See also id.* at 380-81 (Kennedy, J., concurring).

directed the federal courts to stick to their limited role in reviewing state convictions. *See, e.g., Estelle* v. *McGuire*, 112 S. Ct. 475, 480 (1991) ("[W]e reemphasize that it is not the province of a federal habeas court to reexamine state court determinations on state law questions."); *see also Pulley* v. *Harris*, 465 U.S. 37, 41 (1984). But, as this case illustrates, many federal judges find it difficult to separate their role of supervising the federal courts from their narrower role of policing possible constitutional violations in state habeas cases. Nor is this an isolated instance. In two other recent habeas cases, my colleagues casually equated federal rules of procedure with constitutional requirements. *See Henry* v. *Estelle*, 993 F.2d 1423 (9th Cir. 1993); *McKinney* v.

Rees, 993 F.2d 1378 (9th Cir.1993). *Henry* is a particularly egregious example, containing, as it does, the following passage: "This inference is impermissible. Fed.R.Evid. 404." *Henry*, 993 F.2d at 1427. I fear a pattern is emerging where federal judges create constitutional rules that allow them to remake state procedure in the federal image.

As Chief Justice Burger once noted, "[w]e should be cautious about constitutionalizing every procedural device found useful in federal courts, thereby foreclosing the States from experimentation with different approaches which are equally compatible with constitutional principles." *Crist* v. *Bretz*, 437 U.S. 28, 39 (1978) (Burger, C.J., dissenting). If the current trend continues, the concept of due process

will disappear altogether, to be replaced by the Federal Rules of Criminal Procedure. *See Williams*, 399 U.S. at 136-138 (Harlan, J., concurring in result). This is not, I respectfully suggest, a wonderful idea.

CONCLUSION

Dealing with an apparently deadlocked jury is not easy. Reasonable jurists certainly might respond in more than one way. My colleagues today foreclose the State of California from pursuing the approach it prefers merely because this approach doesn't conform to the mold cast by the federal courts. By applying the decision retroactively, the majority compounds the damage. I dissent.

APPENDIX "B"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed: January 20, 1994

GREGORIO JIMENEZ,	)	No. 91-56476
	)	USDC No. CV
Petitioner-Appellant,	)	90-0419-GLT
	)	
v.	)	ORDER
	)	
E.R. MYERS, Warden, ATTORNEY GENERAL OF CALIFORNIA,	)	
	)	
Respondents-Appellees.	)	

Before: BROWNING, HUG, and KOZINSKI, Circuit Judges

A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a

vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX "C"

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GREGORIO JIMINEZ, Petitioner, vs. E. R. MYERS, Respondent.	No. SACV 90-419 GLT(RWR) JUDGMENT

Pursuant to the Order of the Court adopting in part and rejecting in part the findings, conclusions, and recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the petition for Writ of Habeas Corpus is DENIED.

DATED: May 7, 1991

GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GREGORIO JIMINEZ, Petitioner, vs. E. R. MYERS, Respondent.	No. SACV 90-419 GLT(RWR) ORDER ADOPTING IN PART AND REJECTING IN PART REPORTS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE, AND DENYING WRIT OF HABEAS CORPUS

Pursuant to 28 U.S.C. §636(b)(1)(C), the Court has reviewed the Petition, all of the records and files herein, and the attached Reports and Recommendations of the United States Magistrate Judge. Objections to the Report and Recommendation have been filed herein. Having made a de novo determination of those portions of the Report and Recommendation to which objection has been made, the Court adopts in part and rejects

in part the findings and conclusions contained therein, as follows:

I. Preliminary matters.

The Court concurs with and adopts the Magistrate Judge's statement of preliminary matters, Petitioner's Contentions, and Background (Report and Recommendation, pages 1-6).

II. Effect of State Reviewing Court's Findings.

The Court concurs with and adopts the Magistrate Judge's statements in his Final Report and Recommendation (pages 2-3) rejecting Respondent's contention that the state reviewing court's finding of no coercion is binding on Petitioner. The state court finding was a mixture of law and fact, and is not binding on this Court.

Although the state appellate court's conclusion might ordinarily be entitled to

great weight, that rule will not be applied here. In its opinion, the state appellate court duly referred to the two instances of jury polling which occurred, but made only passing reference to what the judge said to the jury after the polls. As correctly noted by the Magistrate Judge, it is the polling, together with the judge's comments afterward, that raise the question of potential coercion. The failure of the state reviewing court to more fully quote and evaluate those comments makes the state court's conclusion of limited value to this Court.

III. Potential Polling Coercion.

The Court concurs with the Magistrate Judge that, under present interpretation of Supreme Court cases, per se reversal is not required if a state court jury is polled on how they stand.

Instead, the polling and inquiry or instructions of the judge must be viewed in light of their full context, and not in isolation, to determine if there was coercion in light of all the circumstances. Locks v. Sumner, 703 F.2d 403, 406-407 (9th Cir. 1983).

The Magistrate Judge has carefully quoted the full context of the polling and judge's remarks, and has correctly stated the circumstances surrounding those events. The Court concurs with and adopts that statement of events.

Based upon those events, the Magistrate Judge concluded: "Given the context of the court's remarks, `substantial movement' that was `important to him' can only reasonably be interpreted in the sense that the movement should continue in the same direction toward unanimity" (Report and Recommendations,

page 10, lines 8-11). Upon reviewing the entire context of the polling and judge's remarks, this Court cannot concur with that conclusion.

In this Court's view, the effect of the judge's questions and remarks was to learn in a neutral way from the jury if further deliberations would be of use to them. From the change in votes, the judge ascertained that the passage of time and further deliberations had led to changes in position. Such changes are a normal part of the jury deliberation process. The comment that "substantial movement" was "important to him" was merely the judge's confirmation that fruitful deliberation was still going on.

In sending them back to "finish the rest of today and see where we are at that point in time," this Court finds no coercion on the last juror to cave in. If

anything, the minority juror would have known that he or she was not under pressure, because the case would likely end in a hung jury if the deadlock continued for a few more hours.

Considering all the circumstances, the Court must conclude there is no showing that the combination of jury polling and judge's comments coerced the jury or deprived Petitioner of a constitutional right. Accordingly, IT IS ORDERED that the Writ of Habeas Corpus Petition filed herein is DENIED.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Reports and Recommendations and the

Judgment herein by United States mail on Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: May 7, 1991.

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GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GREGORIO JIMINEZ, Petitioner, vs. E. R. MYERS, Respondent.	No. SACV 90-419 GLT(RWR) FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

This Final Report and Recommendation and the attached Report and Recommendation are submitted pursuant to the provisions of 28 U.S.C. §636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

On March 13, 1991, the Clerk filed Notice of Filing of Magistrate Judge's Report and Recommendation and the Lodging of Proposed Judgment, which was served on

the parties together with copies of said Report and Recommendation.

Respondent has timely filed his objections to the Report and Recommendation. The Magistrate Judge has carefully read and considered the objections, but he is not persuaded to modify his recommendation in any respect.

Respondent's objections can be condensed into one assertion; that the factual findings of the state reviewing court are binding against Petitioner.

In a habeas review, the federal court must presume that the state appellate's court factual findings are correct unless one of seven circumstances provided for in 28 U.S.C. §2254(d) is present or if the state court finding is not fairly supported by the record. Sumner v. Mata, 455 U.S. 591, 592, 102

S.Ct. 1303, 1304, 71 L.Ed.2d 480 (1982) (per curiam). Section 2254(d) applies only to questions of "`basic, primary, or historical fac[t].'" Strickland v. Washington, 466 U.S. 668, 698, 104 S.Ct. 2052, 2070, 80 L.Ed. 2d 674 (1984) (quoting Townsend v. Sain, 372 U.S. 293, 309 n. 6, 83 S.Ct. 745, 755 n. 6, 9 L.Ed.2d 770 (1963)). The presumption does not apply to a state court's determination of mixed questions of fact and law. Reiger v. Christensen, 789 F.2d 1425, 1428-29 (9th Cir. 1986). A legal conclusion, such as whether a confession was voluntary, is not entitled to a presumption of correctness. Miller v. Fenton, 474 U.S. 104, 112, 106 S.Ct. 445, 450-51, 88 L.Ed.2d 405 (1985).

Respondent argues that a finding of coercion is necessarily a factual finding and, as such, the presumption in §2254

must apply. No authority for this proposition is presented by Respondent. Respondent likens the case at bar to Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed. 2d 847 (1984). In Patton, supra, the Court found that the §2254 presumption applied to a trial court's finding that particular jurors were impartial. In overturning an appellate court finding that the issue was a mixed question of fact and law, the Court determined that the question was "plainly one of historical fact." Id. at 1036, 104 S.Ct. at 2891, 81 L.Ed.2d 847. However, the determination of impartiality by the trial court in Patton, supra, depended on its observation of the voir dire proceedings and its evaluation of each juror's credibility. Id. at 1033-39, 104 S.Ct. at 2892-93, 81 L.Ed.2d 847. These

factual evaluations were the foundation for its finding of impartiality.

In the case at bar, no factual findings underpin the issue of coercion. The state appellate court was presented with a transcript reflecting the trial court's proceedings. From that, it reached the legal conclusion that coercion did not exist. The finding was not factual, but rather was comprised of mixed facts and law. The §2254 presumption does not apply in such cases.

In this due process analysis, the Court has given the conclusion of the state appellate court great weight. See Culombe v. Connecticut, 367 U.S. 568, 605, 81 S.Ct. 1860, 1880, 6 L.Ed.2d 1037 (1961) (opinion of Frankfurter, J.). Nonetheless, in applying federal constitutional prescriptions, as it must, the court finds that the type of polling

used combined with the supplemental jury instructions were coercive. See Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 550, 98 L.Ed.2d 568 (1988). The distinction between this unacceptable polling and other, possibly more appropriate types is clear. In the case at bar, the judge polled the jury on the merits, albeit he did not question them on which direction they were favoring. Concurrently, he made encouraging statements indicating that movement in one direction was important to him[1/] and due to the movement more deliberation may be fruitful.[2/]

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1. The foreperson noted that "there has been some movement in one direction" and the judge affirmatively responded, saying, "[o]kay. Well that's what's important to me..." (RT, 440).

2. The judge told the jury that "[d]ue to the fact that we have had that type of [substantial] movement, I would request, then, to finish the rest of

IT IS THEREFORE THE FINAL RECOMMENDATION OF THE MAGISTRATE JUDGE that an Order be issued by the Court (1) approving these Reports and Recommendations, and (2) GRANTING the Writ of Habeas Corpus and, (3) ordering Petitioner released from custody arising from his conviction, in San Bernardino Superior Court, Case No. OCR-13455 on November 7, 1988 and the sentence imposed on November 16, 1988, unless the Petitioner is granted a new trial within 60 days from the date judgment is entered herein.

Dated: 4/8/91

RONALD W. ROSE
UNITED STATES MAGISTRATE JUDGE

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today..." (RT, 449).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GREGORIO JIMINEZ, Petitioner, vs. E.R. MYERS, Respondent.	No. SACV 90-419 GLT(RWR) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

This Report and Recommendation is submitted pursuant to the provisions of 28 U.S.C. §636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

Petitioner, represented by counsel, commenced this action on June 5, 1990 by filing a Petition for Writ of Habeas Corpus by a Person in State Custody. Both a Return and Traverse have been timely filed. Petitioner is incarcerated in the

California Correctional Training Facility at Soledad, California.

Petitioner was convicted in the San Bernardino County Superior Court on November 7, 1988 of attempted murder (Cal. Penal Code §§664/187), use of a firearm (Cal. Penal Code §12022.5) and infliction of great bodily injury (Cal. Penal Code §12022.7). The court sentenced Petitioner to ten years. (Petition 3).

Petitioner filed a direct appeal to the California Court of Appeals, Fourth Appellate District, which affirmed the conviction on December 8, 1989. He then petitioned the California Supreme Court for review of the issue presented in the case at bar. The petition was denied on March 21, 1990. Petitioner has, therefore, pursued and exhausted his state remedies. See Roman v. Estelle, 917 F.2d 1505 (9th Cir. 1990).

PETITIONER'S CONTENTIONS

Petitioner alleges that the trial court judge committed constitutional error by inquiring into the numerical breakdown of the jury votes and requiring continued deliberation after they had announced that they were deadlocked.

BACKGROUND

The jury began deliberation on the morning of November 3, 1988. At 4:00 that afternoon the trial court judge received a note, signed by the jury's foreman stating, "[w]e are unable to reach a verdict and feel strongly that we would not be able to reach a verdict." (Reporter's Transcript [hereafter RT] 347). The judge consulted with counsel, outside the presence of the jury, and defendant's counsel offered that in his experience, "[i]n a case like this with this type of emotions and feelings,

if they're deadlocked now, they're rarely going to change." (RT 438).

The jury was then allowed in and the court quizzed the foreman about the votes:

> The Court: Without telling me which direction, just numerically, how did it start, and what was it on the last?
>
> The Foreman: [I will] Try to tell you numerically without [indicating] either way. To the best of my recollection, it started out about maybe seven to five, eight to four. Went to nine to three. All right. To back up, this morning, nine, two, and one.
>
> * * *
>
> The Court: All right. So you did have -- how about in between, nine-two and one and then nine-three, <u>has</u>

there been movement one way or the other.

The Foreman: Nine-one-two, I would say at this point. And yes, there has been some movement in one direction.

The Court: Okay. Well, that's what's important to me because of the nature of the type of case. I want to find out that there has been movement. (RT 440) (Emphasis added).

The court then allowed the jury to leave for a three day weekend. The jury returned on Monday morning, November 7, 1988. Deliberations resumed and at 2:03 that afternoon, the court received a second note, "[w]e are in an impasse and request further direction." (RT 447). In response, the judge decided to "bring the jurors out, [to] see if there's been any

substantial movement at all." (RT 447-48). The following then occurred:

The Court: Okay. Now last Friday I inquired of you as to whether or not there had been any movement by the jury. So I'll ask you that same question again with the understanding, all I want is numbers, not which direction that you're at. How many votes have you taken since last Friday?

The Foreman: Two or three. Two.

The Court: Two more?

The Foreman: Uh-huh.

The Court: What's the latest?

The Foreman: Eleven-one.

The Court: So there has been, then, substantial movement since the last time.

The Foreman: Yes.

The Court: All right. Due to the

fact we have had that type of movement, I would request, then, to finish the rest of today and see where we are at that point in time. All right? Okay.

(RT 448-49). (Emphasis added).

Defense counsel then approached the bench and, outside the presence of the jury, told the court that he thought the proper inquiry was to ask the jury whether they felt that further deliberation would cause a change in their position. He explained his rationale by noting:

> Because, just for [sic] hypothetically, if there's one person in there that's for not guilty, it's putting them on a tremendous amount of pressure, and I don't think they should be subjected to that pressure. If that person

> is firm in their verdict, we're not getting deliberations. We're just getting pressure.

(RT 449-50).

The Court took note of defense counsel's comments and stood firm in allowing the continued deliberation because there had been "substantial movement since Friday... [and two hours of deliberation] is not undue pressure on anyone, in my estimation." (RT 450). Two hours later, the jury returned a guilty verdict.

DISCUSSION

Petitioner argues that the trial judge's polling and supplemental statements unfairly coerced the jury into reaching a verdict and thus he was deprived of due process. Courts have long struggled with the propriety of polling

jurors before the verdict is rendered and various standards have been suggested. See Annot., 77 A.L.R.3d 769 (1977).

This Court examines the polling and surrounding events to determine whether, under the totality of circumstances, the result was coercive. The main factors considered are the type of polling used and the coercive nature of any supplemental jury instruction. Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 550, 98 L.Ed.2d 568 (1988); Jenkins v. United States, 380 U.S. 445, 446, 85 S.Ct. 1059, 1060, 13 L.Ed.2d 957 (1965) (per curiam). Although the Court does not evaluate the instructions in a vacuum, the analysis focuses on them to determine whether they infected the entire trial so that the resulting conviction violates due process. Cupp v. Naughten, 414 U.S. 141,

147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973).

Respondent relies on Lowenfield, supra, for the proposition that per se reversal is no longer required in cases such as the one at bar. The Court agrees. The analysis, however, cannot end there. In fact, the Lowenfield court notes that the jury polling, especially when combined with improper jury instructions, presents the potential danger of coercion. Id. at 239-40, 108 S.Ct. at 552. The Court held that the polling in Lowenfield was constitutional. The polling used in that case, however, is distinguishable from the type in the case at bar. Id. As Petitioner points out, the Lowenfield trial judge's inquiry was not on the merits. Rather, the judge specifically asked the jurors if they felt that any more deliberations would enable them to

arrive at a verdict. Id. at 237, 108 S.Ct. at 549. This is in stark contrast to the polling that occurred in the instant case. Here the trial judge asked specifically for the number of votes taken and the results of each voting event.[1/] Defense counsel recommended the Lowenfield approach to the polling of the jury, that is, to center the inquiry on whether they felt more deliberation would be fruitful; the judge refused the suggestion. (RT 449-50).

There is clear distinction between the two alternative polling techniques. When polled on the benefit of further deliberations, the fact that people disclose their view has no effect on their upcoming vote on the merits. People in

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1. The judge specifically asked the jury to refrain from telling him the direction, guilty or not guilty, that the vote leaned.

the majority on the merits are no more likely to conclude that further deliberation would be fruitful than people in the minority, and vice versa.

Repeated polling on the merits has a dramatically different effect. The Supreme Court dealt with identical type polling in Brasfield v. United States, 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345 (1926), the case that the Lowenfield decision ultimately narrowed. The Court noted that merit polling, without more, generally is coercive.

> It can rarely be resorted to without bringing to bear in some degree, serious, although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in

a proper charge, should be excluded. Id. at 450, 47 S.Ct. at 136.

The fact that the judge did not discover or request the foreman to quantify the number of jurors in the majority versus the number in the minority regarding guilt or non-guilt is of no consequence. Id. at 449, 47 S.Ct. at 135. Merit polling, standing alone, supports a finding of coercion.

An additional indication of coercion is provided by counsels' agreement to accept the jury's second stated impasse as an indication that it was hopelessly deadlocked.

Notwithstanding this agreement, the judge decided to bring the jurors out for the expressed purpose of determining if there had been any substantial movement. (RT 447-48). This must be contrasted with the Lowenfield analysis, in which the

Court noted that defense counsel neither objected to the polls nor the supplemental instruction, lending credence to the decision that coercion did not exist.[2/] Lowenfield, 484 U.S. at 240, 108 S.Ct. at 552.

Next, the Court analyzes the judge's comments and instructions themselves. His initial and proper instruction to the jurors before they began their deliberation was, in pertinent part, as follows:

> Each of you must decide the case for yourself but should do so only after a discussion of the evidence and

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2. In the Lowenfield decision the Court implied that the likelihood of potential coercion would have been buttressed had defense counsel objected "on the spot". Lowenfield, 484 U.S. at 240, 108 S.Ct. at 552. In the case at bar, defense counsel did object to the type polling being utilized and suggested an alternative.

the instructions with the other jurors.

You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors or any of them favor such a decision.

(RT 426-27) (Emphasis added).

Nonetheless, after the jury reached their first impasse, the judge determined that the voting was progressing, seven-five, eight-four, nine-three, and told the jury to return to deliberate because such movement was important to him. (RT 440). After the jury reached a second and final impasse, and the poll was eleven-one, the judge specifically asked if there had been substantial movement in the vote. Given the context of the

court's remarks, "substantial movement" that was "important to him" can only reasonably be interpreted in the sense that the movement should continue in the same direction toward unanimity. The coercion on the sole juror is apparent. The judge desired a verdict, the jury was moving in that direction, and then, the judge allowed the majority two more hours to convince the lone holdout; it was simply a matter of time.

As intended, the jury returned with its verdict quickly after restarting deliberation; this creates a strong inference of coercion. United States v. United States Gypsum Co., 438 U.S. 422, 462, 98 S.Ct. 2864, 2886, 57 L.Ed.2d 854 (1978).

CONCLUSION

After thoroughly reviewing the entire file and in considering all of the events in context, the Magistrate Judge concludes that the jury polling, coupled with the judge's supplemental instruction, was sufficiently coercive to violate Petitioner's due process right to a fair trial.

IT IS THEREFORE RECOMMENDED that the Court issue an Order (1) approving the adopting of this Report and Recommendation as the findings of fact and conclusions of law herein, (2) GRANTING the Writ of Habeas Corpus and, (3) ordering Petitioner released from custody arising from his conviction, in San Bernardino Superior Court, Case No. OCR-13455 on November 7, 1988 and the sentence imposed on November 16, 1988, unless the Petitioner is granted

a new trial within 60 days from the date judgment is entered herein.

Dated: March 11, 1991

RONALD W. ROSE
UNITED STATES MAGISTRATE JUDGE

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

Filed: December 8, 1989

PEOPLE OF THE STATE OF CALIFORNIA,	)	E006239
Plaintiff and Respondent,	)	Super. Ct. No. OCR-13455
v.	)	
GREGORIO LOPEZ JIMENEZ,	)	OPINION
Defendant and Appellant.	)	

APPEAL from the Superior Court of San Bernardino County. DuYane M. Lloyd, Judge. Affirmed.

Appellate Defenders, Inc., Marjorie F. Cohn, and Howard C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Richard B. Iglehart, Chief Assistant

Attorney General, Harley D. Mayfield, Senior Assistant Attorney General, Raquel M. Gonzalez and Robert P. Whitlock, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Gregorio Jimenez of attempted murder (Pen. Code, §§ 664/187), during which he used a firearm (Pen. Code, § 12022.5) and inflicted serious bodily injury (Pen. Code, § 12022.7). He was sentenced to prison and appeals claiming jury instruction error and judicial misconduct.

FACTS

Jimenez and his cousin, the victim, had had a romantic relationship. Jimenez wanted to marry her, but she wanted to terminate the relationship. Jimenez went to her house and they argued about some papers but eventually resolved their dispute. When the victim reiterated her

desire to end their affair, Jimenez threatened to "mess her up" and he said if he couldn't have her, no one else would. He pulled a gun out of his sock and pointed it at her telling her it had two bullets for her and two for him, and that they were both going to die. Suddenly, the victim's son came in the room, so Jimenez put the gun in his back waistband. Jimenez left through the front door as the victim's son cried and yelled at him. The victim, who was at the front door, asked Jimenez if he had come over to upset her son. Jimenez responded, "No, I came over for this." At that, he fired the gun into the air, then aimed and shot twice at the victim, who had retreated inside, closing the door. He continued firing until he shot himself in the forehead.

Jimenez contended at trial that he had brought the gun to the victim's home

because he was trying to sell it to her neighbor. When the sale did not go through, he put it in his sock because he was afraid to leave it in his car trunk, which did not lock. He said he threatened her with the gun to scare her because she had been "talking . . . rather strong" to him about the termination of their relationship. He claimed the victim's son called him a bad name and the victim accused him of bringing the gun so he could shoot her. He maintained the conversation then returned to the issue of the papers, which was resolved. He walked out the front door, with the gun in his back waistband. As he neared his car, she told him to go "f--- himself." He took the gun out and fired one shot into the air "to scare her," as she stood at the front door. She closed the door. He claimed he fired another shot into the

air, waited until he thought she would be sitting on the couch in the living room and fired two more shots into the door. He said at the time he shot into the door, he was "very angry, and . . . was trying to scare her. [He] felt very much offended." He later testified he didn't "know exactly [whether he] got angry [when she told him what to do with himself.]" He also said he did not know what he was thinking when he fired into the door, then he claimed his only thought was to scare her, a position he reiterated throughout the remainder of his testimony. He fired the fifth shot into the ground and the sixth, he claims, accidentally hit his forehead. He said he was "very angry . . . very crazy, and . . . affected by the liquor [he had previously consumed]" when he fired the fifth shot.

In argument to the jury, the People

maintained that Jimenez committed an attempted murder because he intended to kill the victim when he shot at her. Jimenez, on the other hand, argued that he only intended to scare her, and was, therefore, not guilty of the charged offense.

DISCUSSION

1. Jury Instructions

The jury was given the standard instructions on attempted murder, including the requirement that the People prove beyond a reasonable doubt that Jimenez intended to kill the victim. Jimenez, as a tactical decision, chose to forego instructions on voluntary manslaughter, with its concomitant concepts of provocation and heat of passion. Jimenez now contends that the jury, sua sponte, should have been instructed that the intent to kill

necessary to establish attempted murder may be negated by heat of passion and that his tactical decision to forego instructions on attempted voluntary manslaughter should not foreclose his present claim. We disagree.

Jimenez hinges his argument in large part on *Mullaney* v. *Wilbur* (1975) 421 U.S. 684. In *Mullaney*, the United States Supreme Court held that a Maine law which placed upon the defendant the burden of proving by a preponderance of evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter was a violation of the due process clause. The court noted:

"In this country the concept of malice aforethought took on two distinct meanings: in some jurisdictions it came to signify a substantive element of intent, requiring the prosecution to prove

that the defendant intended to kill . . .; in other jurisdictions it remained a policy presumption, indicating only that absent proof to the contrary a homicide was presumed not to have occurred in the heat of passion. . . . [I]n the past half century, the large majority of States have [come to] require the prosecution to prove the absence of the heat of passion on sudden provocation beyond a reasonable doubt." (*Id.* at pp. 695-696.)

The "expansive proceduralist view" (Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence* (1989) 40 Hastings L.J. 457, 465), expressed in *Mullaney*, was heavily criticized (see articles cited therein) and later redefined in *Patterson* v. *New York* (1977) 432 U.S. 197 in such a manner that it is no longer applicable to California's law on homicide. In *Patterson*, the court upheld as not

violative of the due process clause a New York law which placed upon the defendant the burden of proving by preponderance of the evidence that he acted under the influence of extreme emotional disturbance, a form of heat of passion. The court noted:

"[U]nder New York law . . . [t]he death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime. The statute does not provide an affirmative defense -- that the defendant acted under the influence of extreme emotional disturbance . . . which . . . would reduce the crime to manslaughter, an offense defined in a separate section of the statute. It is plain enough that if

the intentional killing is shown, the State intends to deal with the defendant as a murderer unless he demonstrates the mitigating circumstances. [¶] It seems to us that the State satisfied the mandate of *Winship* that it prove beyond a reasonable doubt 'every fact necessary to constitute the crime with which [Patterson] was charged.' . . . [¶] The Due Process Clause, as we see it, does not put New York to the choice of abandoning [the affirmative defenses to murder] or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment. [¶] To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be

too cumbersome, too expensive, and too inaccurate." (*Id.* at pp. 205-210.)

The *Patterson* court noted the inapplicability of its holding in *Mullaney*, noting that under Maine law, in contrast to New York's, "malice, in the sense of the absence of provocation, was part of the definition of [murder]." (*Id.* at p. 216.)

California law is like that of New York rather than Maine. Instructions that heat of passion may negate intent to kill, a concept with which we do not take issue, has never been required *apart from the jury's consideration of the crime of voluntary manslaughter*, an option foreclosed by Jimenez's tactical decision here. Disproving heat of passion is not an element of murder, therefore, there was no sua sponte obligation to instruct on it. We have no quarrel with instructing

this jury that if it believed Jimenez acted under heat of passion, he could not have been guilty of attempted murder. We do, however, take issue with Jimenez's desire that this jury be told that he was *thereby also* not guilty of *any* crime. The law is quite contrary. If he acted under heat of passion, he is guilty of attempted voluntary manslaughter -- he is not legally blameless. To give Jimenez what he wants would require us to allow all criminal defendants to pick and choose for which crimes they wish to run the risk of being convicted. Obviously, this we cannot do.

2. Judicial Misconduct

Two hours and forty-five minutes after the jury began its deliberations, it requested a readback. A little longer than one hour after the readback had been completed, the jurors reported to the

court, "We are unable to reach a verdict and feel strongly that we would not be able to reach a verdict." With no objection from either party, the trial court undertook to determine "if there is reasonable movement at this time." It did so by asking the foreperson how many votes had been taken and what their numerical division was, without saying which way the vote was going. She reported that between five and six votes had been taken and her recollection of the division was 7-5, 8-4, 9-3, and 9-2-1. She added "there has been some movement in one direction." Since it was then late in the afternoon before a long weekend, the court dismissed the jury until the following court day, asking them to deliberate "at least for the morning to see if we have any further movement."

That morning, they deliberated another

three hours, during which they asked for printed copies of the jury instructions and for a readback of counsel's arguments, the latter request being denied by the trial court. A half hour after returning from their lunch break, the jury reported, "We are in an impasse and request further direction." Again, without objection, the court decided to bring the jury out and determine "if there's been any substantial movement at all. If there has not been, then I'll have to declare a mistrial." The foreperson reported that there had been two or three votes since the court had last inquired and the last vote was 11-1. She confirmed that there had been substantial movement since then. The court asked the jury to "finish the rest of today and see where we are at that point in time." Two hours later, they reached a verdict.

Penal Code section 1140 prohibits a trial court from declaring a mistrial unless "it satisfactorily appears that there is no reasonable probability that the jury can agree" on a verdict. "The discharge of this responsibility necessarily requires that the court, in cases where the jury has been unable to reach agreement make the indicated determination of 'reasonable probability' and, in cases where in accordance with sound legal discretion [citations omitted] it is determined that such a probability exists, that it take appropriate action to encourage agreement. Thus, the court in such cases may inquire of the jury as to its numerical division without seeking to discover how many jurors are for conviction and how many are for acquittal." (*People* v. *Carter* (1968) 68 Cal.2d 810, 815; accord, *People* v.

Rodriguez (1986) 42 Cal.3d 730, 776, fn. 14 ["[A] neutral inquiry into numerical division, properly used, is an important tool in ascertaining the probability of agreement."].) The only limit placed on the inquiry as to numerical divisions is that its results not be used to pressure minority jurors into voting with the majority. (*People* v. *Gainer* (1977) 19 Cal.3d 835, 841, 844-845.) In *People* v. *Sheldon* (1989) 48 Cal.3d 935, the trial court asked the deadlocked jury what its numerical division was. The jury said it was 11 to 1 in favor of the death penalty. The vote was said to be "firm," the deadlock "hopeless." Still, the trial court insisted on questioning individual jurors and when it did, it discovered that there was disagreement as to whether a rereading of the instructions might break the deadlock. The California Supreme

Court found this procedure to be non-coercive. In *People* v. *Cole* (1982) 31 Cal.3d 568, 582, the California Supreme Court held that directing a deadlocked jury to continue deliberations is not impermissible.

Nothing more than the two activities approved by the Supreme Court in *Cole* occurred here. Aside from these considerations, we note that the jury asked for reinstruction and readbacks after initially reporting its deadlock. In the second report, the jurors sought the direction of the trial court, indicating they did not believe the situation was totally hopeless. Once again the crucial inquiry was whether movement had occurred and they were sent back to further deliberate to see if more movement would take place. They had previously been instructed as to the

legitimate factors they were to employ in reaching their decision. After the verdict was rendered, they were polled -- each confirmed that guilt was his or her individual verdict. While this was not factually a complicated or long case, the crucial issue -- Jimenez's intent when he shot the victim -- was not easily discernible, especially in light of the victim's post-shooting conciliatory gestures towards Jimenez and Jimenez's profession of love for her. The jury deliberated less than two days.

We find nothing coercive in the manner in which the trial court determined the probability that the jury could reach a verdict. The court acted merely as a neutral observer, not as a cheerleader for some final determination. There was no error in this regard.

DISPOSITION

The judgment is affirmed.

NOT FOR PUBLICATION.

/s/ Hollenhorst

Acting P.J.

We concur:

/s/ McDaniel
J.

/s/ Dabney
J.

Supreme Court, U.S.
FILED
JUN - 7 1994
OFFICE OF THE CLERK

NO. 93-1821

SUPREME COURT OF THE UNITED STATES
October Term, 1993

E.R. MYERS, Warden, et al.,
Petitioners

v.

GREGORIO JIMENEZ, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

ANSWER TO PETITION FOR WRIT OF CERTIORARI

APPELLATE DEFENDERS, INC.

Howard C. Cohen
Staff Attorney
Bar No. 053313

233 "A" Street
12th Floor
San Diego, California 92101
(619) 696-0284, Ext. 24

Attorneys for Respondent

QUESTIONS PRESENTED[1]

As an introduction to its presented questions, petitioners in their petition for certiorari (hereinafter Petition) state, "[T]he Ninth Circuit . . . ruled the state trial court coerced the deadlocked jury because it inquired into the jury's numerical division but failed to give the cautionary portion of the Allen charge." Petition p. i. In actuality, the majority opinion below, as shall be discussed, was based on "the totality of circumstances" of which the numerical

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[1] Pursuant to Rules 15.2, 24.2, and 33, of this Court, respondent Jimenez shall present limited comment on the Questions Presented and Statement of the Case to the extent that petitioner's presentation may be deficient.

inquiry and omission of any cautionary language were but two of a multitude of circumstances.

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NO. 93-1821

SUPREME COURT OF THE UNITED STATES
October Term, 1993

E.R. MYERS, Warden, et al.,
Petitioners

v.

GREGORIO JIMENEZ, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

ANSWER TO PETITION FOR WRIT OF CERTIORARI

Gregorio Jimenez hereby answers the State of California's petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE[2]

The following is offered in supplementation to Petitioners' Statement of the Case.

Upon leaving the residence of the victim (his cousin and ex-fiancee), where he had visited in an unsuccessful attempt to rekindle their engagement, Gregorio Jimenez[3] fired several shots in apparent anger after the cousin/ex-fiancee had hurled an expletive at him. She had slammed her door shut as he whirled around to shoot toward the closed door. Some shots went wide of the door, while two went through the door

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[2] See footnote 1, ante.

[3] The correct spelling of respondent's name is "Jimenez." While it is spelled correctly in the Ninth Circuit's slip opinion and the Federal Reporter, it is misspelled in the Petition.

and struck her. The key issue presented to the jury was whether Jimenez had harbored a specific intent to kill when he fired. See generally, Petition, App. A, p. 42, App. D, pp. 132-135.

As a matter of trial tactics, defense counsel forewent the option of the lesser included offense of manslaughter and argued there was reasonable doubt as to an intent to kill, and the jury was presented with an all-or-nothing choice of attempted murder or acquittal. See generally, Petition, App. A, pp. 42-43.

Petitioners' statement of the case may be misleading as to the process of deliberations. Compare Petition p. 4 with App. A, p. 43 and App. D, p. 142. In actuality, the state court records indicate that on

November 3, 1988, the jury deliberated from 9:15 a.m.-12:00 p.m. (2 3/4 hrs.), from 1:30-2:13 p.m. (3/4 hr.), a readback occurred from about 2:13-2:43 p.m. (1/2 hr.),[4] and then the jury deliberated from 2:43-4:34 p.m. (1 3/4 hrs.), though at about 3:50-3:55 p.m. the jury sent its *first* note indicating an impasse.

While defense counsel did not then make a formal objection before the trial court addressed the jury the first time, he did note a concern. Petition, App. A, p. 44.

The colloquy quoted (Petition pp. 5-8) is accurate. In addition to

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[4] In its first day of deliberation, the jury had requested to view the firearm and to have re-read to them portions of the testimony of the three key witnesses (1) appellant, (2) the victim, and (3) the victim's son. C.T., pp. 118-122.

the trial court noting that "[the movement in one direction] was important to [him] because of the nature of the type of case," (Petition p. 7), respondent would add the trial court earlier had disabused the venire of the likelihood that there would be any hardship discharges from their duty, adding *inter alia*, that the jury system was "very cumbersome" and "costs [money to] operate." R.T. pp. 25-29.

In supplementation to Petition p. 10, respondent emphasizes that even before the trial court made his second numerical inquiry and before defense counsel expressly moved for mistrial, first *the prosecutor* and defense counsel recognized mistrial may be appropriate. Compare Petition pp. 8-10 with App. A, p. 46.

REASONS FOR *NOT* GRANTING THE WRIT

Contrary to petitioners' contention that the California Supreme Court and the Ninth Circuit have developed "conflicting rules regarding supplemental charges to a deadlocked jury," Petition p. 16, in regard to the instant issue, there is no conflict. That is, while California permits numerical inquiry as to the merits but prohibits an Allen charge, People v. Gainer, 566 P.2d 997 (1977), People v. Rodriguez, 726 P.2d 113, whereas federal procedure prohibits numerical inquiry but permits an Allen charge, nevertheless, ***in neither jurisdiction are both permitted, one in conjunction with the other.***

Petitioners, in reference to other states which permit numerical

inquiry, Petition p.p. 16-17, paint with too broad a brush. Petitioners point to *no jurisdiction or cases* which permit both numerical inquiry as to the jury's division on the merits ***AND in conjunction*** an Allen charge or commentary without any cautionary supplemental instruction.

The majority of the panel below, in conformity with this Court and other circuits, Petition, App. A, pp. 51-52, n.2, and accompanying text, merely utilized the "totality of circumstances" test to determine whether appellant had been deprived of due process. The opinion below in nowise interfered with the state practice. It merely found that in the totality of circumstances, where the trial court, inter alia, treated the jury to an Allen-type comment

prohibited by state law, a holdout juror was coerced and thereby respondent was denied due process. The only state convictions placed "at stake" would be those in which the trial court made a numerical inquiry ***and*** gave an Allen charge or comment ***without*** any cautionary instruction ***and***, in which, ***given the totality of the circumstances*** a juror was coerced, but any such conviction (e.g., the instant case) should be suspect. Therefore, there is no need for certiorari review.

ARGUMENT

I

THE OPINION BELOW DOES NOT CONDEMN NUMERICAL INQUIRIES PER SE AND NO ARGUMENT HAS BEEN MADE THAT NUMERICAL INQUIRY PER SE VIOLATES DUE PROCESS. NEVERTHELESS, WHEN *IN ADDITION* TO A NUMERICAL INQUIRY, A COURT MAKES AN ALLEN-TYPE COMMENT TO THE JURY WITHOUT CAUTIONARY INSTRUCTION SUCH THAT A HOLDOUT JUROR, *GIVEN THE TOTALITY OF THE CIRCUMSTANCES*, WOULD BE COERCED, DUE PROCESS IS VIOLATED.

Introduction

Before addressing petitioners' Argument, respondent first will set forth the totality of the circumstances:

During voir dire, the trial court would not countenance any hardship discharge of a juror, telling the jurors that the jury system was "very cumbersome" and "costs [money to] operate." R.T. pp. 25-29. The trial was neither long nor complex. The trial (excluding

voir dire) started on the afternoon of Thursday, October 27, 1988, and following a weekend recess (the trial court was "dark" on Friday), continued from Monday, October 31, 1988, through Wednesday, November 2, 1988. ER 35. There were only three key witnesses: the victim, her son, and respondent.

As a trial tactic, defense counsel forewent lesser included offense verdicts and instruction, going forth on an all-or-nothing defense based on a reasonable doubt as to intent to kill. See generally, Petition, App. A, pp. 42-43.

The jury began its deliberations the following morning. During its day long deliberations, the jury made various requests in regard to the evidence, requesting to view the

firearm and to have re-read to them portions of the testimony of the three key witnesses, i.e., appellant, the victim, and the victim's son. C.T. pp. 118-122. Thereafter, the jury sent its ***first*** note of impasse, indicating they "strongly" felt they could not reach a verdict. The defense counsel indicated his concern, but the trial court inquired as to the numerical division on the merits, was informed that the vote had begun either 7-5 or 8-4 and had progressed in <u>one direction</u> to a 9-1-2 split; the trial court then, in response to the divulged information as to the movement in a sole direction, told the jury, ". . . . Well, ***that's what's important to me because of the nature of the type of case***. . . ." Petition p. 7 and App.

A, pp. 44-46 [emphasis added]. The trial court then released them until Monday morning indicating they should deliberate at least through the morning. Petition p. 7.

On Monday morning, the jury resumed deliberations. During their deliberations, they requested copies of the printed jury instructions and arguments of counsel; the former were provided and the latter denied. C.T. pp. 131-132.

After a lunch break, the jury continued deliberations, only to send to the court a ***second*** note of impasse which expressly "request[ed] ***further direction.***" Petition p. 9, emphasis added. ***Both the prosecutor and defense counsel*** opined that a mistrial would be appropriate. Petition, App. A, p. 46. The trial

court nevertheless undertook to make another numerical inquiry. In response to the court's inquiry, the foreperson stated that after two more votes, the split was 11-1. The court questioned the foreperson, "So there has been, then, ***substantial*** movement since the last time," and received an affirmative response from the foreperson. The trial court sent the jury back to deliberate, telling the jury, "***[d]ue to the fact we have had that type of movement*** . . . ." Petition, App. A, pp. 47-48.

Defense counsel objected and asked for an inquiry as to whether further deliberation would be fruitful; the trial court declined. Petition, App. A, p. 49. Approximately, one hour, forty eight minutes later, the jury, with no

further requests to the court, returned a guilty verdict.

Discussion

Petitioners begin their argument (Petition p. 19) with a quote from People v. Rodriguez, 726 P.2d 113, 142, n.14 (1986), suggesting that "[the California Supreme] Court has expressly held that a numerical-division inquiry is 'an important tool in ascertaining the probability of agreement.'" Petitioners' preceding quotation is not taken in full context; rather the Rodriguez court concluded, "We remain persuaded, as in [People v.] Carter [(1968) 68 Cal.2d 810], that a **neutral** inquiry into numerical division, **properly used**, is an important tool . . . ." People v. Rodriguez, 726 P.2d at 142, n.14.

For reasons which follow, the trial court's comments were not neutral, and, given the totality of circumstances, the inquiries were not properly used.

Petitioners' reading of the opinion below is that "the Ninth Circuit determined that if the state of California wishes to permit inquiries into the numerical division of deadlocked juries, the state must also give juries the cautionary portion of the Allen charge." Petition p. 22. Petitioners misconstrue the determination of the majority. Rather than the petitioners' slant on a supposed holding which the majority did not hold, the majority concluded that when the trial court inquired into the numerical division of the jury

and, in contravention of state law also treated the jury to an Allen-type commentary, that given the totality of circumstances, of which the failure to give a cautionary instruction was one factor, due process had been violated.

Petitioners note that Hawaii and Washington are other states within the Circuit which permit numerical polling. Petition p. 27. Hopefully, without sounding redundant, respondent stresses that *respondent has not argued nor has the majority held that there is anything impermissible with a state procedure permitting such polling per se.* Indeed, petitioners in the very next breath (ibid.) concede that neither Hawaii nor Washington permits Allen-type instruction or comment. See

State v. Watkins, 660 P.2d 1117, 1122 (Wash. 1983); State v. Villeza, 817 P.2d 1054, 1058 (Hawaii 1991). Indeed, the Villeza Court concluded that plain error requiring reversal occurred when numerical polling was linked to an Allen-type instruction, which is precisely what occurred here. Id. at 1059.

(Parenthetically, respondent notes that petitioners attempt to seek refuge in the general jury instructions given to the jury before deliberation and, in specific, CALJIC No. 17.40 which indicates how the jury should deliberate. Petition pp. 25-26, n.4, and accompanying text. State v. Villeza, 817 P.2d 1054 to which respondents themselves cite, Petition p. 27, rejects that notion, holding that such general instruction

before deliberation "has nothing to do with the issue of being deadlocked." Id. at 1059.)

Respondents then cite cases seriatim from those states which permit numerical inquiry, e.g., Missouri, Oklahoma, Mississippi, Texas, Louisiana, and New Mexico. Again, the holding below does not cast aspersions on numerical polling per se. Nevertheless, in Missouri, polling is not coercive when a "hammer" instruction or comment is not given, State v. Jamerson, 809 S.W.2d 726 (Mo. 1991), while a "hammer" instruction is coercive. State v. Burns, 808 S.W.2d 1 (Mo. 1991).

In regard to Mississippi, an Allen charge is prohibited. Edlin v. State, 523 So.2d 42 (Miss. 1988).

Similarly, Louisiana has disapproved the Allen charge, State v. Nicholson, 315 So.2d 639 (La. 1975), though where some objectional language is contained in a supplemental charge, where such supplemental charge likewise *does* contain cautionary language, e.g., a juror should not yield a conscientious conviction, coercion would not be present. State v. Caston, 561 So.2d 941, 942-943 (La.App. 1990).

The Texas case cited by petitioners, Odom v. State, 682 S.W.2d 445, 448 (Tex. Ct. App. 1984) emphasized that the instruction given to the jury indicated that the jurors should continue to deliberate without doing violence to their conscience, and the trial judge reiterated the cautionary instruction. Similarly,

in Oklahoma, affirmance is salvaged where supplemental instruction does contain cautionary language telling jurors, not to surrender their honest conviction and good conscience. Drew v. State, 771 P.2d 224, 229 (Okl.Cr. 1989). Here, in contrast, there was no ameliorative instruction, either after the first noted impasse or the second.

Petitioners then note two states, Illinois and Arizona, which have found numerical polling error, albeit harmless. Petition p. 29. Again, though, since respondent is not contending nor the majority holding that numerical inquiry is error, citation to these states has little bearing on the actual issue, let alone why this Court should grant certiorari.

Petitioners cite cases from four states, Arkansas, Georgia, Oregon, and Minnesota, for the proposition that numerical inquiry is permissible when given with supplemental instruction. Petition p. 29. However, in each of the cited cases, the supplemental language contained the cautionary language conspicuously absent in the instant case. Hardin v. State, 284 S.W.2d 111, 115 (Ark. 1955) [the jury should resume deliberations "without any individual juror waiving any conscientious conviction"]; Black v. State, 341 S.E.2d 436, 438 (Ga. 1986) [jurors should not merely acquiesce and should not abandon their honest conviction]; State v. Anderson, 78 N.W.2d 320, 326-327 (Minn. 1956) [same]; State v. Marsh, 490 P.2d 491,

500-501 (Or. 1971) [in the particular "'factual background,'" including the jury's request for further instructions on elements indicating continued deliberations, a "'modified'" and "'balanced'" supplemental instruction, including admonition not to vote except according to conscience, not coercive].

Finally, petitioners cite to the states of North Carolina, Alabama, Colorado, Iowa, and Nevada, which review the ***totality of circumstances*** to determine whether an inquiry was coercive. Petition pp. 29-30. Of course, as noted above, this is ***precisely the test used by the majority below***, and hence, these cases are hardly reason to grant certiorari. Individually, given the

totality of circumstances, each of the cited cases is distinguishable from the instant circumstances. E.g., People v. Austin, 523 P.2d 989, 993-994 (Colo. 1974) [no Allen charge or commentary; substitute judge, in absence of trial judge,[5] had inquired as to numerical split during morning deliberations; in the afternoon, jury unilaterally reported, i.e., no inquiry made, its numerical split and indicated the possibility of a verdict]; White v. State, 603 P.2d 1063 (Nev. 1979) [no indication of Allen charge or commentary]; State v. Cornell, 266 N.W.2d 15, 19 (Iowa 1978) [Allen-type charge contained cautionary language that there should "'not [be] mere acquiescence'" and

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[5] See page 28, infra.

the jurors should "'decide . . . if you can conscientiously do so. . . .'"]; Richardson v. State, 508 So.2d 289, 293-294 (Ala. Crim. App. 1987) [no Allen charge or commentary]; State v. Bussey, 361 S.E.2d 564, 566-567 (N.C. 1987) [supplemental instruction informing jury to resume deliberations "'without violence to your individual judgment and . . . [not] surrender your honest, conscientious convictions . . . ," i.e., "notable for [its] balance," not coercive].

In regard to the totality of circumstances, which the court below utilized as the appropriate test, respondent can discern at least twelve factors which may weigh in the balance of the totality of the circumstances; of these twelve, at

least ten weigh in appellant's favor.

First, one may contrast an ***affirmative inquiry*** on the part of the trial court versus an inadvertent disclosure.[6] Here, there was indeed an affirmative inquiry. Contrast Locks v. Sumner, 703 F.2d 403 (9th Cir. 1983) and United States v. Ajiboye, 961 F.2d 892 (9th Cir. 1992), where the disclosures were inadvertent. Second, an inquiry on the ***merits*** may be distinguished from an inquiry on the whether further deliberations would be useful. Here, the inquiries were on the merits rather than the fruitfulness of further deliberations. Contrast

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[6] Again, as an affirmative inquiry is countenanced by state practice, the affirmative inquiry per se is not coercive, *but* it is a factor to weigh in determining how a lay juror may be coerced.

Lowenfield v. Phelps, 484 U.S. 231, 240 (1988).[7] Third, one should consider the ***number of impasses*** or inquiries. Most often, the issue arises when only a single impasse has been announced (see, e.g., Cornell v. Iowa, 628 F.2d 1044 (8th Cir. 1980), whereas here, there were *two*. A fourth consideration is the ***degree of the split*** vote. In contrast to a 7-5 split (see ibid.), here, coercive statements were made after the first impasse when the vote was 9-1-2 and, then again, after the second impasse when the vote was *11-1*.

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[7] Chief Justice Rehnquist's discussion of the independence of the two types of inquiry and why there is a distinction between the two (484 U.S. at 240), would serve no purpose whatsoever unless merit polling was indeed more "dangerous," i.e., coercive.

Fifth, although not a requirement to preserve the issue, whether an ***objection*** was voiced is an indicia of recognition. In Lowenfield v. Phelps, 484 U.S. at 240, Chief Justice Rehnquist noted the absence of an objection. Here, after the first impasse, defense counsel noted his concern, Petition, App. A, p. 44, and after the second impasse (but before the trial court's unfortunate colloquy), *both the prosecutor and defense counsel concluded a mistrial was in order.* Petition, App. A, p. 46. A sixth criterion is the ***trend of movement***. One vote at one time (e.g., 8-4) and a different subsequent vote (e.g., 9-3) does not necessarily mean that the movement was in one direction. See, e.g., United States v. Ajiboye, 961

F.2d 892, where the trend of voting on at least one count reversed. Here, the trial court ascertained that the movement progressed in one direction (from 7-5 or 8-4, to 9-3, 9-1-2, 11-1).

Seventh is the ***identity of the judge***. For instance, the judge making the inquiry in Locks v. Sumner, 703 F.2d at 405, n.1, was a substitute for the judge who had presided at trial but who had become ill. (Therefore, since the inquiring judge had not heard any of the evidence, no juror would interpret any of his/her actions as an indication of the judge's beliefs about the case.) Here, in stark contrast, the judge was the judge who had heard the trial and who had told the jury, "That's [movement in one

direction] what's *important to me* . . . ." Petition, App. A, p. 7, emphasis added.[8]

Next (eighth), one must discern the ***timing*** of the court's comments in comparison to the inquiry or disclosure of the numerical split. Of course, this is not a case simply of a mere inquiry sans any Allen charge or analogous comment. Contrast United States ex rel. Kirk v. Director, Dept. of Corrections, 678 F.2d 723 (7th Cir. 1982); People v. Austin, 523 P.2d 989; White v. State, 603 P.2d 1063; Richardson v.

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[8] Moreover, the importance of the verdict to the trial judge as communicated to the jury, must be determined in the total context of the trial; recall that earlier the trial judge had indicated to the venire that the jury system was "very cumbersome" and "costs [money to] operate." R.T., p. 26.

State, 508 So.2d 289. Also, it is not a case where the court was treated to disclosure and gave no immediate Allen charge, only later to give an Allen charge, but then without any further disclosure or inquiry. United States v. Ajiboye, 961 F.2d 892. Rather, here, after both the first and second inquiries following statements of impasse, the court treated the jury to immediate comments concerning the value of proceeding in one direction.

A ninth standard is the ***complexity, length, and nature of the case.***[9] The instant case was neither

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[9] Two other factors would be the **length and *caliber* of deliberations before the coercion** and the **length and *caliber* of deliberations after the coercion**. While the opinion, Petition, App. A, pp. 56-57, addresses the length, it does not address the caliber. (Cont.)

complex nor long. There were only three key witnesses. The single issue for the jury to determine was whether appellant, upon leaving the residence of the victim (his cousin

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As to the *caliber* of deliberations, the jury--before the first impasse note--made no less than four requests concerning the evidence. C.T. pp. 118-122. They requested to view the firearm and to have re-read to them portions of the testimony of appellant, the victim, and the victim's son. After the court refused to excuse the jury following his first inquiry, when the jury returned to deliberate on a Monday morning, they requested a copy of the instructions and a read-back of counsels' arguments; the former was granted and the latter denied. C.T. pp. 132-133; R.T. pp. 444-446. After the second impasse and inquiry, the jury demonstrated no further inquisitiveness before rendering the verdict.

Respondent would suggest that instead of absolute time in assessing how the length of jury deliberation weighs in the balance, the length of deliberations should be considered in comparison to the length and complexity of the trial and the caliber of the deliberations.

and ex-fiancee), specifically intended to kill, when he fired in apparent anger after the cousin/ex-fiancee had hurled an expletive at him and then slammed her door shut as he whirled around to shoot toward the closed door.

As for the nature of the case, recall that defense counsel deliberately pursued an all-or-nothing strategy based on the defense theory of absence of specific intent to kill. Page 10, ante; see generally, Petition, App. A, pp. 42-43. As this Court recognized in Keeble v. United States, 412 U.S. 205, 212-213 (1973), with original italics and boldface underscoring added, "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty

of *some* offense, **the jury is likely to resolve its doubts in favor of conviction**." Thus, while the trial court did not explicitly ask the jurors which way (guilt or acquittal) the 11-1 split had gone, still, as a matter of probability, it was toward guilt.

A tenth aspect would be the *content of the comments*. As noted above, the comments contained no cautionary language that a juror should not surrender his/her conscience. See also pages 19-22, ante. Moreover, at the crucial moment, when the jury expressly asked the judge for "further direction" as to how to proceed (in light, as the court then determined, of an 11-1 split) and the prosecutor and defense counsel both concluded a mistrial was

in order, the trial judge not only spoke to the jury but engaged the foreperson in conversation. The court, rather than merely noting to himself the movement of the vote, in the colloquy *expressly stated his observation to the jury, gained the foreperson's express agreement, and then, stating that "[d]ue to . . . that type of movement," sent the jury back for further deliberations.*

In its petition for rehearing to the Ninth Circuit, petitioners suggested that the opinion below was somehow inconsistent with prior Ninth Circuit precedent, namely, Locks v. Sumner, 703 F.2d 403. The *test* in both the instant case and Locks is *exactly the same*: "To determine whether such coercion of the jury's deliberative process occurred, the

inquiry by the judge must be viewed in light of the context in which it was made, not in isolation." Id. at 406-407. The only difference between Locks and the instant case is that taken in context, here the court's comments *were coercive* and in Locks they were not.[10]

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[10] In Locks, there had been one noted impasse, the inquiry was made by a substitute judge who had not heard the evidence, the inquiry was merely as to whether a weekend adjournment was necessary or whether the jury could possibly reach a verdict before the recess, and there was no suggestion that the jury's vote had flowed in one direction. Id. at 405, n.1, 407. *Here, inter alia*, there were two impasses, the inquiries were made by the trial judge who had heard the evidence and who had informed the jury of the expense of the jury trial, the inquiries were as to the split of the jury on the merits, the information divulged and acknowledged was that the vote had progressed in one direction, and the jury expressly sought the court's "further direction."

II

THE COURT OF APPEALS DID NOT APPLY A "NEW RULE" FOR THE FIRST TIME ON COLLATERAL REVIEW.

Petitioners correctly state that the Court below specifically held it was not announcing a new rule of criminal procedure not dictated by existing precedent. Petition p. 31 and App. A, pp. 50-51, 60-61. Petitioners' contention that a so-called "new rule" was promulgated, contrary to Teague v. Lane, 489 U.S. 288 (1989),[11] is premised on a

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[11] Since petitioners did not raise a Teague-type argument in the district court, either in its return or in its objections to the magistrate judge's recommendations, one may question whether respondent has waived such a defense. Boardman v. Estelle, 957 F.2d 1523, 1534-1537 (9th Cir. 1992); Jordan v. Ducharme, 983 F.2d 933 (9th Cir. 1993). In Boardman, the state failed to raise a Teague-type defense both in the district court and on appeal, at least before a petition for

fallacy. Implicit in its argument, Petition pp. 32-33, is the notion that the trial court did no wrong, that he merely relied on state precedent and merely inquired into the numerical division of the jury. Petition pp. 32-33. But the trial judge did more. One cannot reasonably perceive the totality of the circumstances without understanding that the trial court's colloquies with the jury served the same purpose as Allen charge.

Instead of an Allen charge per se, the trial court engaged in

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rehearing. Boardman v. Estelle, 957 F.2d at 1537. In Jordan, the appellate court exercised its discretion not to entertain a Teague objection where respondent had not raised the issue in the district court. 983 F.2d at 936. Here, like Jordan, respondent failed to raise a Teague-type defense in the district court.

colloquies which were far more coercive than an Allen charge. The essence of an Allen charge is ". . . . It is important therefore that you reach a verdict . . . .[12] It is important that you attempt to reach a verdict." Petition, App. A, p. 78. Here, the trial judge said as much if not more. After the ***first*** impasse when informed that there had been movement in one direction, the trial judge responded, "Well, that's what's important to me because of the nature of the type of case." Petition, App. A, pp. 45-46. This statement not

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[12] The ellipses immediately preceding qualify the language "It is important therefore that you reach a verdict" with the immediate language "if you can do so conscientiously." See, e.g., Petition, App. A, p. 78. As emphasized above, there was no balanced, cautionary language spoken to the jury.

only tells the minority jurors to jump on the bandwagon, it ***also*** tells the majority jurors not to jump off. After the ***second*** impasse, the jury expressly sought "further direction" from the court. The court affirmatively inquired and determined the vote was by then 11-1, voiced his observation that there had been "substantial movement," and then "[d]ue to the fact we have had that type of movement," sent the jury back. For all intents and purposes, there is no meaningful difference between the Allen charge and the court's comments.

Here, the majority employed the "the totality of circumstances" test. The totality of the circumstances standard had its origin in Jenkins v. United States, 380 U.S. 445 (1965).

In reversing a conviction obtained after the judge told the jury it was required to reach a verdict, this Court stated, "Upon review of the record, we conclude that in its context and under all the circumstances the judge's statement had the coercive effect attributed to it." Id. at 446. Similarly, in Lowenfield v. Phelps, 484 U.S. at 237, quoting Jenkins, this Court concluded, "[o]ur review of petitioner's contention that the jury was improperly coerced requires that we consider the supplemental charge given by the trial court 'in its context and under all the circumstances.'"

In Lowenfield v. Phelps, this Court was faced (as here, also) with a due process challenge to a

combination of polling and supplemental instruction. This Court held, that under the Lowenfield facts, the combination was not "coercive." Id. at 241. The Court immediately admonished, however, "By so holding we do not mean to be understood as saying other combinations of supplemental charges and polling might not require a different conclusion." Ibid. The combination of factors in this case are just such a combination which require the conclusion of coercion, the result in this case is practically dictated by Lowenfield.

Amongst the factors from which this Court concluded there had not been coercion in Lowenfield, the Chief Justice noted that the inquiry of the trial judge had been to the

numerical division as to how they stood on the question of whether further deliberations might assist them in returning a verdict, not on the numerical division as to the merits. Id. at 240. Here, though, the multiple inquiries as to numerical division were as to the **merits**; indeed, defense counsel noted that the proper inquiry would be as to whether continued deliberations would be fruitful, but the trial court refused the suggestion. Petition, App. A, p. 48.

The Chief Justice also noted there had been no objection by defense counsel as to the polls or the supplemental instruction; the Court did not suggest that the lack of objection was a waiver, but rather, the omission indicated that

the potential for coercion was not apparent to one on the spot. Lowenfield v. Phelps, 484 U.S. at 240. Here, in sharp contrast, when the jury had tendered its second note of impasse, **both** the **prosecutor** and **defense counsel** concluded that it was time to accept the impasse and declare a mistrial (Petition, App. A, p. 46); the only reasonable conclusion was that the potential for coercion was apparent.

A third contrast is the lack of balance in the trial court's statements to the jury in the case at bar. In Lowenfield, the trial court gave a neutral Allen-type instruction; neutral, that is, in the sense, that in addition to informing the jurors that each should discuss and consider the case impartially

with the other jurors, the court twice emphasized the duty of an individual juror to remain true to his or her own conscience. Thus, the trial court in Lowenfield had admonished the jury to reach an independent decision and not to surrender personal conviction simply because other jurors felt differently. Here, in conspicuous contrast, the trial court gave no such ameliorative admonition.

The opinion below is not remarkable in the test applied, "the totality of circumstances," and applies *no* "new rule." It merely has considered a totality of circumstances from which one may reasonably infer that the lone

holdout juror was coerced. Because no "new rule" has been applied, writ of certiorari is unnecessary.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

APPELLATE DEFENDERS, INC.

HOWARD C. COHEN
Staff Attorney